

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

VOLUME 9 (P.M. portion)

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1                   NOTE: The afternoon portion of the case on December  
2 15, 2015, begins in the absence of the jury as follow:

3 JURY OUT

4                   THE COURT: All right. Are we ready for our jury?  
5 All right. Thank you for that. It's so much fun  
6 seeing your old law clerks. And fortunately they're all doing  
7 great. There's just nothing like it. It's terrific.

8 Joe, let's get our jury.

9                   NOTE: At this point the jury returns to the  
10 courtroom; whereupon the case continues as follows:

11 JURY IN

12                   THE COURT: All right, please be seated.

13 Do we have a witness?

14 MR. CARACAPPA: Dr. Bardwell.

15                   ROBERT BARDWELL, recalled by counsel for the  
16 plaintiff, having been previously duly sworn, continues to  
17 testify and states as follows:

18 DIRECT EXAMINATION

19 BY MR. CARACAPPA: (Continuing)

20 Q. Dr. Bardwell, good afternoon. How are you?

21 A. Good afternoon, Mr. Caracappa.

22 Q. If I could continue my questions. We're almost done.

23 Dr. Bardwell, this is a document that we talked about  
24 the last time you were here as well. Do you recall that?

25 A. I do.

1 Q. Could you explain this document, please.

2 A. Well, this is essentially a summary of the findings. And  
3 it shows the little total number of IP addresses and  
4 infringements in the first row, 104,090 IP addresses. Sharing  
5 songs, 1,847,516 times. As recorded on the Rightscorp  
6 database.

7 Q. And just to be clear, those are 104,000 different Cox  
8 subscribers that are accused of infringement; is that right?

9 A. Different IP addresses, yes.

10 Q. Okay, thank you.

11 A. And then of those, 42,790 are IP addresses that usually  
12 share multiple songs, but only on one day. And those are all  
13 repeat infringers that don't need to be verified because they  
14 occur all at once. Those constitute 132,704 infractions.

15 And then the last row are the results from the  
16 probability model, and it found that 60,706 of the accounts  
17 could be verified, and those were responsible for 1,640,416  
18 instances of sharing songs recorded in the Rightscorp database.

19 Q. We've been going back and forth between the Rightscorp  
20 data and the Cox data, and I just want to be clear, what data  
21 does this summary exhibit relate to?

22 A. This is the Rightscorp data.

23 Q. This has nothing to do with the 122 pieces of data that  
24 Cox provided, right?

25 A. That's correct. The 122 is just confirmation of the

1 results of the model presented in the last row.

2 Q. Would you say this 60,000 number is an overestimate or an  
3 underestimate of the number of verified accounts that commit  
4 multiple acts of infringement over a period of time?

5 A. You know, as we saw lots of evidence, for instance those  
6 122 accounts, all of those are repeat infringing accounts, only  
7 75 percent of them are verified by the model.

8 So that's just an indication that it's definitely an  
9 underestimate.

10 Q. So to the extent that Dr. Lehr uses this 60,000 number,  
11 that's an underestimate, right?

12 A. That's correct.

13 Q. Of the 104,090 counts of infringement, how many were Cox  
14 able to verify?

15 A. So these are accounts, infringing accounts. Their data  
16 verified 122 of them, everyone that they provided data on.

17 Q. Did they provide you or BMG with data on any other  
18 accounts?

19 A. They did not.

20 Q. There was some testimony earlier about how in your  
21 original report this 60,706 number was, I think, 68,000. Do  
22 you recall that?

23 A. I do.

24 Q. And can you explain the discrepancy between those two  
25 numbers?

1 A. Yeah. It is my understanding that the songs that were  
2 asserted in the case changed. And so, it was necessary for me  
3 to remove some of the infringements.

4 Q. I want to talk for a minute about the 122 accounts that  
5 Cox provided information with respect to. All right?

6 A. Very good.

7 Q. Karl, can you pull up transcript 1674.

8 And you read Dr. Sullivan's testimony, correct?

9 A. I did.

10 Q. Okay. The question from Cox to Dr. Sullivan was, "So,  
11 have you compared the results of the model, various models that  
12 Dr. Bardwell presented?"

13 And Dr. Sullivan says in the third sentence -- Karl,  
14 if you could highlight this -- "He," meaning Dr. Bardwell, "has  
15 only done that for 122, roughly 122 IP addresses out of what he  
16 views to be approximately 60,000 different accounts."

17 Do you recall that?

18 A. I do.

19 Q. Let's go to the transcript at 1676.

20 And then for emphasis, counsel says, "Again,  
21 Dr. Sullivan, Dr. Bardwell hand picked to provide to you that  
22 subset, right?" And then Dr. Sullivan says, "That's right."

23 Do you see that?

24 A. I do.

25 Q. And did you read that testimony?

1 A. I did.

2 Q. And finally, again, "Out of 60,000, these are the ones  
3 he," meaning you, Dr. Bardwell, "chose to demonstrate, right?"

4 A. That's what he said.

5 Q. Did you hand pick those 122 records?

6 A. No. They were provided to me by Cox.

7 Q. So Cox hand picked them, right?

8 A. That's correct.

9 Q. And is it fair to say that you asked for all the records  
10 associated with the subscribers accused of infringement in this  
11 case?

12 A. From my earliest involvement I asked for all of the data,  
13 yes, to confirm repeat infringing accounts.

14 Q. And did Cox have those records?

15 A. It's my understanding they --

16 MR. WAKEFIELD: Objection, lacks foundation.

17 THE COURT: Sustained.

18 BY MR. CARACAPPA: (Continuing)

19 Q. Do you know whether Cox had those records?

20 A. It's my understanding at some point they didn't.

21 Q. Thank you. If Cox had produced those records that you had  
22 requested, how, if at all, would it affect your analysis?

23 A. Well, probably I wouldn't be here because you would have  
24 the data and you could tell if they were repeat infringing  
25 accounts.



1 Q. And you wouldn't have to do probabilities, you would just  
2 look, right?

3 A. That's the difference. You know, we don't have that  
4 telltale sign, indicator of repeat infringing accounts, so we  
5 have to build a probability model to determine if we have --  
6 the evidence we do have is adequate to confirm that some of  
7 them are repeat infringing accounts.

8 I would still like to be here because then I could do  
9 a much more thorough job vetting my model, but I wouldn't be  
10 necessary.

11 Q. So of the 122 that you did have, how did that compare to  
12 the probability model that you built?

13 A. Well, the model was either correctly, the verification --  
14 the accounts we verified were confirmed to be verified. Some  
15 of the accounts that were -- all 122 are verified by Cox to be  
16 repeat infringing accounts. 75 percent of them I -- my model,  
17 both the conservative and the revised model, identified them as  
18 verified accounts.

19 The other 25 percent, the model didn't have enough  
20 evidence to verify them. And that's part of the conservatism  
21 of the model, both models, the revised model and the  
22 conservative model.

23 Q. So again, is it fair to say that those 122 proved to you  
24 that your model underestimated the number of repeat  
25 infringements?

1 A. Certainly.

2 MR. CARACAPPA: Thank you. Pass the witness, Your  
3 Honor.

4 THE COURT: All right, thank you.  
5 Cross-examination, Mr. Wakefield.

6 MR. WAKEFIELD: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. WAKEFIELD:

9 Q. And good afternoon, Dr. Bardwell.

10 A. Good afternoon, Mr. Wakefield.

11 Q. If Cox still had the name of every account holder going  
12 back to the beginning of time, it wouldn't tell you that that  
13 person did anything with a particular computer, would it?

14 A. I'm not sure I understand your question.

15 Q. You were saying it would have been -- it would have been  
16 nice if there had been additional records beyond the 122 that  
17 were involved in this case. But my question is, even if you  
18 know who the account holder is and you have that record, you  
19 still don't know that that account holder was operating a  
20 computer and making any song available, downloading a song, or  
21 uploading a song? You don't know that that person did it, do  
22 you?

23 A. And you mean the identity of the person, per se, specific  
24 person?

25 Q. Right.

1 A. No, my model only addresses the repeat infringing  
2 accounts.

3 Q. The account.

4 A. Correct.

5 Q. Not whether the person to whom that account is assigned  
6 and who pays the bill actually did anything?

7 A. That's correct. But I misstated that. It also is -- the  
8 results are almost identical, we can confirm almost the same  
9 results for a specific computer, not just the account.

10 Q. Right. And that computer could be a computer that is  
11 infected with malware, right?

12 A. I suppose, yes.

13 Q. You testified to that a couple days ago. That computer  
14 could belong to a neighbor of an account holder?

15 A. I suppose that's possible.

16 Q. Okay. You spoke about probability versus statistics, and  
17 I want to just try to understand that a little bit better.

18 In assessing probability, I've often heard people  
19 refer to coins or sometimes poker chips, they can be one color  
20 or another. Have you heard that one?

21 A. Yes.

22 Q. So if you have 100 poker chips and they can either be red  
23 or blue, and you have a 90 percent probability for that set of  
24 poker chips that they're red, there are 100 of them, does that  
25 mean that ten are blue?

1 A. I'm not sure I understand the --

2 Q. All right.

3 A. Yeah. Do you mean you have red chips and blue chips?

4 Q. Right. They're solid red or solid blue, so there's no  
5 flipping in this one.

6 A. And you're saying we have 90 --

7 Q. You have 100.

8 A. 90 of which are red and ten of which are blue?

9 Q. Well, if you have a 90 percent probability for that set of  
10 100, would ten of them be blue?

11 A. 90 percent chance, if I pick one at random it's red, then  
12 I would expect 90 of them to be red and ten to be blue,  
13 correct.

14 Q. Okay, thank you. It's like --

15 A. I've just got to make sure I understand you, this poker  
16 game we're playing.

17 Q. And in this case, you are not using the data you  
18 analyzed -- let me ask it this differently.

19 You're not using a sample of data to then make  
20 predictions about other data in this case; isn't that right?

21 A. That's correct.

22 Q. Okay. I want to understand something you said earlier  
23 about the code. Mr. Sullivan pointed out after your first  
24 report and before your second report that he felt the code  
25 didn't work, do you remember that?

1 A. I do.

2 Q. And then you had a chance to respond to that in a further  
3 report?

4 A. Yes.

5 Q. And then you had your deposition taken, do you remember?

6 A. I do.

7 Q. And at that time you said you did not personally supervise  
8 the actual writing of that code, that R code, right?

9 A. I think that was a misunderstanding about the question.  
10 So I supervised it. I was interpreting your question meaning  
11 did I, you know, sit, watch over their shoulder as my staff  
12 wrote it. No, I do not do that. But I supervise both the  
13 design and the testing and the implementation of it, yeah.

14 Q. Okay. And at the time of your deposition, you had not  
15 personally run the R code, your people on your team had done  
16 that?

17 A. That's correct.

18 Q. Okay. And even after we pointed out the issue, you had  
19 not seen it run as of the time of your deposition?

20 A. Well, I've seen it run many times. I don't watch it, it  
21 takes two hours to run. And I'm not there watching it run, but  
22 I'm very frequently working with my team while they're running  
23 new iterations and reporting results.

24 So I can't say -- I don't even know how you would see  
25 it run, frankly. But it's kind of a weird image. The computer

1 just sits there for two hours working very hard --

2 Q. Okay.

3 A. -- to produce all the results.

4 Q. But you testified you personally had not run the code  
5 yourself?

6 A. That's correct.

7 Q. Okay. And now you've asked people to verify it, two other  
8 people I believe you testified?

9 A. Yes.

10 Q. But did you -- as you sit here now, have you now run the  
11 code yourself?

12 A. No, I have not.

13 Q. If we can pull up PDX 6, which is the demonstrative you  
14 used today, and go to page 4. Let's go to the next page,  
15 please.

16 So I just want to understand what is being  
17 represented here. You've broken out the song codes now into  
18 different artists' names; is that right?

19 A. That's correct.

20 Q. So you have Frank Ocean, Kanye, Bruno Mars, and some  
21 others there?

22 A. Correct.

23 Q. And this is -- your analysis concludes this is one  
24 subscriber's account; is that right?

25 A. Yes, it verifies this is a repeat infringing account at

1 over 97 percent probability.

2 Q. Okay. And so this -- assuming it is one person using the  
3 account, this one person had an observation of The Notorious  
4 B.I.G. on September 21, September 30, October 1, and  
5 October 22; is that right?

6 A. Yes. And also, what, the 25th. And then again on  
7 November 16, 17th, and December 1, and again on December 30.

8 Q. All right. This would indicate that if Rightscorp is  
9 making observations on this account, it sees The Notorious  
10 B.I.G. music there being made available or on a computer on  
11 October 22, and then it disappears on the 23rd, and there are  
12 two different songs that appear on that computer; is that  
13 right?

14 A. Is that a question? Yeah. Is that correct? No, I think  
15 that's incorrect. The information you're providing about the  
16 songs is correct, but the characterization that they disappear  
17 from the computer is, I believe, not correct.

18 So as I testified earlier, what this indicates is  
19 that Rightscorp made a make available request to that computer  
20 on the days we just mentioned for the torrent that included the  
21 N. B.I.G. song that is recorded there. All it means on any  
22 other day that that -- that we don't have red squares under  
23 that N. B.I.G. column, it just means either making a request  
24 the song wasn't available or there was no request made.

25 So this pattern could also -- and I think from my

1 understanding it's as or more likely that the absence of the  
2 N. B.I.G. song were days that the rights torrent software  
3 didn't request that song in one of its queries, and instead it  
4 randomly selects torrents to pick.

5 And so, on that next first gap that you mentioned,  
6 instead of like the songs not being there and they are replaced  
7 by Kid Cudi, the -- my understanding is perhaps a more likely  
8 scenario is that on those two days where we have the Kid Cudi  
9 song shared, the Rightscorp program requests those songs to be  
10 made available and doesn't request the N. B.I.G. songs to be  
11 made available.

12 Q. You never looked at the Rightscorp code that makes the  
13 requests?

14 A. I did not.

15 Q. You just looked at the data set that it produced?

16 A. That's correct. Sorry.

17 Q. Okay. The other possibility is if Rightscorp had been  
18 looking for that work, that that would mean this person,  
19 assuming it is one person, decided to share Notorious B.I.G.  
20 and then decided to stop and decided to share -- go into their  
21 computer and share Kid Cudi and not Notorious B.I.G. for a  
22 couple days, and then stopped sharing Kid Cudi and start  
23 sharing Notorious B.I.G., and then a few days later all of a  
24 sudden share Frank Ocean for one day and then stop?

25 A. That also seems possible, yes.



1 Q. Okay. But you have no expertise in how people actually  
2 use BitTorrent, that's not --

3 A. None outside of the education I have gotten in this case.

4 Q. Okay. I think in your summary there was a total of about  
5 104,000 accused accounts that you then went to verify?

6 A. Accused? You mean -- I called them suspected.

7 Q. Suspected, yeah.

8 A. I certainly didn't accuse them.

9 Q. Okay. Suspected accounts. And --

10 A. And not in the sense that they were suspects, just that  
11 they might be accounts and I was verifying them.

12 Q. Okay. They might be accounts. Are you aware that at the  
13 outset of this case there was an allegation that there were  
14 over 200,000 repeat infringing subscriber accounts?

15 A. Well, I know the numbers have changed a lot. As I said, I  
16 received 15 million records. I ended up analyzing just under 2  
17 million. So many of the -- much of the data was eliminated  
18 from my analysis.

19 Q. So there was, speaking of that, that data, you analyzed  
20 about 1.8 million ultimately?

21 A. Yeah. Correct.

22 Q. 1.8 million records. But there were 7.6 million notices  
23 from BMG to Cox in this case, were you aware of that?

24 A. No, I don't. I am not familiar with that number.

25 Q. Assuming that's the case, do you have any idea what

1 happened to the other millions and millions of records that you  
2 didn't analyze?

3 A. As I said, I don't have any information about that.

4 Q. Okay. So Cox provided some customer account information.  
5 Were you aware that Cox had other customer account information  
6 for the period of time after this lawsuit?

7 A. After --

8 Q. After the date of the lawsuit?

9 A. No, I don't think I have any information about that.

10 Q. In your original analysis you included notices that were  
11 sent both before and after the filing date of this lawsuit?

12 A. That's correct.

13 Q. And those included BMG notices?

14 A. Correct.

15 Q. All right.

16 A. But those weren't Cox data, those were Rightscorp data  
17 that I had.

18 Q. Right. But were you aware that Cox had customer  
19 information from around the time of the lawsuit going forward?

20 A. I don't have any information about that.

21 MR. CARACAPPA: Your Honor, objection.

22 THE COURT: Asked and answered. I will allow it.

23 BY MR. WAKEFIELD: (Continuing)

24 Q. And then are you also aware that BMG then decided to drop  
25 those claims for the period of time where there was customer

1 information and only pursue claims for the earlier period of  
2 time?

3 A. I have no information about that.

4 MR. WAKEFIELD: Nothing further. Thank you.

5 THE COURT: Thank you. Any redirect?

6 MR. CARACAPPA: Your Honor, if I can have ten  
7 seconds?

8 THE COURT: Certainly.

9 MR. CARACAPPA: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. CARACAPPA:

12 Q. Dr. Bardwell, you were asked a question about the  
13 7.6 million Rightscorp notices. Do you recall that?

14 A. I do.

15 Q. Do you know if that includes BMG songs not in this  
16 lawsuit?

17 A. I really don't have any information about that data.

18 Q. Do you know if -- do you have any idea what that  
19 information is about?

20 A. No, I don't.

21 MR. CARACAPPA: Okay. Thank you. No further  
22 questions, Your Honor.

23 THE COURT: All right. May Dr. Bardwell be excused  
24 now? You are excused with our thanks, sir.

25 MR. CARACAPPA: Yes.

1 THE COURT: Have a good afternoon.

2 THE WITNESS: Thank you.

3 THE COURT: Thank you.

4 NOTE: The witness stood down.

5 THE COURT: All right. Next witness.

6 MR. CARACAPPA: Yeah. Sorry. BMG calls Dr. -- I  
7 always mispronounce your name. Dr. McGarty.

8 NOTE: The witness is sworn.

9 THE COURT: Good afternoon.

10 THE WITNESS: Good afternoon.

11 TERRENCE MCGARTY, called by counsel for the  
12 plaintiff, first being duly sworn, testifies and states:

13 DIRECT EXAMINATION

14 BY MR. ALLAN:

15 Q. Good afternoon, Dr. McGarty.

16 A. Good afternoon.

17 Q. Could you state your full name for the record.

18 A. Terrence McGarty.

19 Q. Thank you. Could you tell the jury a little bit about  
20 yourself.

21 A. I was born in New York City. And my father was a police  
22 officer and my grandfather was a police officer, so I come from  
23 a fairly interesting background.

24 I went to college in New York, Manhattan College,  
25 where I received my Bachelor's degree in electrical

1 engineering. And then went on to MIT where I received three  
2 degrees, Ph.D. in electrical engineering and computer science,  
3 a Master's, and a degree in electrical engineering.

4 Q. Are you currently in the Internet and telecommunications  
5 business?

6 A. Currently in the international --

7 Q. Internet.

8 A. Internet? At the current time, no. We have moved into  
9 other areas.

10 Q. Okay. Have you spent time in your profession in the  
11 Internet and telecommunications space?

12 A. Yeah. I started in the Internet space probably in 1975 in  
13 the early days when the Defense Department had a division  
14 called ARPA --

15 Q. What is that?

16 A. Advanced Research Project Agency. And at that time there  
17 were two principals, the head of the group called Bob Kahn and  
18 Vint Cerf. Both I think got President's Award for their work  
19 on developing the Internet.

20 And I had come down from MIT because I had been on  
21 the teaching and research staff, and my job was to put up the  
22 first two international connections for what was to become the  
23 Internet. One went to the UK in Goonhilly, and one went to  
24 Trondheim in Norway.

25 Q. So what's the relationship between ARPA and the Internet?

1 A. In the '70s the early days of what we now see as the  
2 Internet was an attempt to connect many different computers  
3 together in those days at universities so that users could do  
4 what we are doing today, so that they could communicate back  
5 and forth to one another over a very large network. And the  
6 Defense Department funded this effort. And we developed the  
7 early versions of what we now call IP protocol. That came out  
8 about '74, '75 in original papers. And we were implementing  
9 those during that period of the '70s.

10 Q. Great. Dr. McGarty, I would like to show you -- I will  
11 hand you first a witness binder, if I may.

12 A. Thank you.

13 Q. Dr. McGarty, could you turn to DTX 3436.

14 A. Yes, sir.

15 Q. Do you recognize this document?

16 A. Yes, that's my CV.

17 Q. Okay. Is it true and accurate?

18 A. It appears to be.

19 MR. ALLAN: Your Honor, I would move Dr. McGarty's CV  
20 into evidence.

21 THE COURT: Any objection?

22 MR. BUCKLEY: No objection.

23 THE COURT: All right. It is received.

24 MR. ALLAN: Can we pull that up, please.

25 BY MR. ALLAN: (Continuing)

1 Q. So, Dr. McGarty, after your work at -- or dealing with  
2 ARPA, tell us a little bit more about your work experience,  
3 please.

4 A. I left Washington about '80 and went up to New York where  
5 I went to work at Warner Cable. It now is Time Warner Cable.  
6 And my responsibility there was in building what Warner had as  
7 a two-way interactive cable system. We were providing two-way  
8 voice, video, and data over a cable system, and it was the  
9 early days of what we now see as interactive cable.

10 Q. So how, if at all, was your role involved in the  
11 operational aspect of it?

12 A. I was the group president in that area. I was responsible  
13 for putting together the architecture, the system design,  
14 functional specifications, putting together the operating  
15 system, integrating it together on a test platform, and then  
16 deploying it and testing it with customers on an operating  
17 network.

18 Q. Thank you. After you left Warner, what was your next  
19 role?

20 A. After Warner, I moved on to NYNEX, which is now Verizon.  
21 I was there from '86 to '92. First three years I was the head  
22 of research and development. And the second three years I was  
23 senior vice-president and acted as the chief operating officer  
24 of the cellular company, which is now Verizon Wireless.

25 Q. Thank you. Tell the jury a little bit about what you did

1997

1 as the head of R&D in that portion of your work.

2 A. As a head of R&D I was responsible for the development of  
3 advanced service platforms and support efforts and new products  
4 for NYNEX. We did network management systems, advanced network  
5 management systems. We worked on deploying Internet protocol  
6 based systems, Internet type systems to a network in New York  
7 state called NYSERNet.

8 We did multimedia communications, some of the early  
9 stuff that now is received by everybody in their day-to-day  
10 computers, but we were trying the first stages of making that  
11 work. And we also developed sophisticated software platforms  
12 for customer service and support systems.

13 Q. You mentioned network management. What do you mean by  
14 that?

15 A. Network management is a broad term that I've used over and  
16 over again in multiple systems I've operated. It's basically  
17 the facilities that go out and measure what is happening in the  
18 network, what is working properly, what is not working  
19 properly, what we have to activate, what we have to deactivate,  
20 what we provision, what we have to repair.

21 So it's all of the operational functions associated  
22 with running a network.

23 Q. Thank you. And did you testify earlier that you were the  
24 chief operating officer of the wireless company?

25 A. That's correct.



1998

1 Q. Tell us a little bit about that.

2 A. Well, as the head of operations on the wireless side, I  
3 had responsibility for now running the billing systems and the  
4 network management systems and the customer service systems and  
5 all of the operation elements of -- at that time NYNEX Mobile.  
6 I think we had probably upwards of, and I may get it wrong,  
7 several -- you know, almost 800,000 subscribers in New York and  
8 New England.

9 And so, I had to deploy all of the new digital  
10 networks that we were putting in. We had some early stages of  
11 data networks. And we had to make sure that our customer  
12 service and billing systems were put in place because in those  
13 days we were getting millions of records a day out of each cell  
14 tower for each telephone call.

15 So if anybody remembers the early days of cellular,  
16 you actually got a bill every month for every call. And we had  
17 to process all of those calls and all of those bills. And  
18 customers would call in and say, I didn't make that call. So  
19 we had to have customer service to be able to make sure we  
20 dealt with those concerns. So very heavily customer oriented.

21 Q. So just looking at your CV here, I see Telemarc Group.  
22 What is that?

23 A. Telemarc is a small company that -- we do technology  
24 investments and management. So after NYNEX, I decided I wanted  
25 to start companies up.

1999

1           So I have a group of associates that we have worked  
2 with over the years, and we have done a couple of dozen or so  
3 start-ups over that period of time. Probably the largest was a  
4 company called Zephyr, which I created.

5 Q.   What is that?

6 A.   In 1995 to 2005. It was the largest ISP and fiber optic  
7 backbone company in central and eastern Europe. We covered  
8 about 20 countries. My office was in Prague. I had an office  
9 in Moscow, which I probably couldn't do now as well. I was in  
10 Warsaw, Germany, France, Austria, Italy, Hungary, Greece. And  
11 so we were pretty much in all central and eastern Europe.

12 Q.   So how did Zephyr compare to a traditional ISP like Cox?

13 A.   We were a little bit of Cox and a little bit of something  
14 else. We had a major fiber backbone network so that we had our  
15 own fiber, and we connected from Bulgaria, Romania, all the way  
16 through to Frankfurt in Germany, and then north and south and  
17 up to Moscow.

18           So one part was broad fiber backbone network. And  
19 the other part, for example, in cities like Prague, we actually  
20 had a local service where we provided ISP to consumers, we  
21 provided telephone service, and we even had some small video  
22 service capabilities in those days.

23           So we were a major ISP in Poland and the Czech  
24 Republic and Slovakia.

25 Q.   What was your role at Zephyr?

1 A. I was the one that founded the company. I ran it on a  
2 day-to-day basis. I had an office both in New Jersey and  
3 primarily in Prague.

4 Q. Dr. McGarty, have you got any teaching experience,  
5 higher-education teaching experience?

6 A. Yes, I was on the faculty of MIT from '69 through '75,  
7 faculty and research staff. I returned '89 to '91. And when I  
8 sold off my company in Europe, I returned pro bono from 2005 to  
9 2012.

10 I also was on the faculty at GW down here in  
11 Washington. I was on the faculty at the business school at  
12 Columbia where I taught telecommunications, finance, and  
13 policy. And I had a similar position at NYU Poly in New York  
14 in the early '90s.

15 MR. ALLAN: Thank you. Your Honor, at this point we  
16 would offer Dr. McGarty as an expert in the design and  
17 implementation of Internet telecommunications networks,  
18 including IP data networks in the operations of companies that  
19 use such networks.

20 THE COURT: Any objection?

21 MR. BUCKLEY: That seems a little broader than maybe  
22 what he spoke to, telecommunications generally. I take  
23 exception to the way it was described.

24 THE COURT: All right. I'll allow it. I think he  
25 has covered that much ground in the initial questions and

1 through his resumé. Clearly he's been involved in a series of  
2 different areas surrounding the Internet and its building and  
3 structure. So I'll allow him to be qualified to give his  
4 opinion on those matters.

5 Thank you.

6 MR. ALLAN: Very good. Thank you, Your Honor.

7 BY MR. ALLAN: (Continuing)

8 Q. Dr. McGarty, could you tell the jury what you were asked  
9 to do in this case.

10 A. I was asked to do two general tasks. One was to examine  
11 Cox's CATS system for copyright infringement focus, not all of  
12 the parts of CATS system. And determine its capabilities with  
13 regards to dealing with copyright infringement notices.

14 And secondly, I was asked to specifically look at the  
15 operational and logistical capabilities of that system to  
16 handle Rightscorp infringement notices.

17 Q. Very good. And what types of materials did you look at in  
18 forming your opinion?

19 A. I had a wide variety of material that I looked at. I  
20 looked at depositions. I looked at operational documents that  
21 were provided to me through Cox, such as implementation plans,  
22 specific values associated with those implementation plans. I  
23 looked at e-mails.

24 I looked at interrogatories that were provided by  
25 Cox. And I also looked at some of the trial transcript for the

1 trial up through Mr. Carothers, I believe, last week.

2 Q. You've reviewed the trial transcript of this, in this  
3 case?

4 A. I did, yes.

5 Q. Very good. How about the AUP or the M&P?

6 A. I've looked also at a variety of other Cox material which  
7 included the AUP, which is the user policy that Cox has. I've  
8 looked at Cox Web sites and other material.

9 Q. Thank you. I would like you to flip in your book, if you  
10 could, to what should be the first tab, PX 1344.

11 A. 1344?

12 Q. 1344.

13 A. Okay.

14 Q. Are you with me?

15 A. I'm trying. I have 1343. Ah, I see it. Yes.

16 Q. Okay. Do you recognize this document?

17 A. Yeah, this -- yes, I do.

18 Q. And is this one of the technical documents you looked at  
19 provided by Cox?

20 A. Yes, it is.

21 MR. ALLAN: I would move this into evidence, Your  
22 Honor.

23 THE COURT: Any objection?

24 MR. BUCKLEY: Can we have a sidebar?

25 THE COURT: Yes, sir.

1 MR. BUCKLEY: Actually, Your Honor, you know what, no  
2 objection.

3 THE COURT: Okay, it's received.

4 MR. ALLAN: Thank you, Your Honor.

5 BY MR. ALLAN: (Continuing)

6 Q. Dr. McGarty, tell us what this document is.

7 A. This document is entitled CATS Abuse Automation System  
8 Implementation Plan, and it is dated March 22, 2010. And this  
9 is an -- the way I read it, it's an implementation plan of what  
10 the CATS system should do.

11 I've written a lot of functional specifications in  
12 system documents, in requirements documents, and generally  
13 these are the things that you have that says, this is what your  
14 system should do and kind of how it should do it. It's not a  
15 coding document. It's a document that says, you know, if it  
16 does these things, then it's doing the right stuff per the  
17 document.

18 Q. And how did you use this document, Dr. McGarty, in forming  
19 your opinion?

20 A. Well, I examined the document to understand how the system  
21 is architected. And a lot of what I do is architecture work.  
22 I mean, I'm at the top level and I want to know what goes into  
23 what and what are the pieces.

24 So I used this document first to understand the  
25 architectural structure of the system, what are its components

1 and elements, how they communicated with each other, what they  
2 were supposed to do as, for example, copyright infringement  
3 notices were sent to the system. And, you know, where was  
4 stuff stored and how did that storage kind of work and, you  
5 know, what were the operator terminals going to look at.

6 And this document provides at a fairly high but  
7 detailed level, in my opinion, a reasonable description of the  
8 system.

9 Q. Okay, thank you, Dr. McGarty. Could you summarize your  
10 opinions in this case for the jury.

11 A. Yes. Simply, the first opinion is with results to the  
12 Rightscorp infringement notices, I felt that this system, the  
13 CATS system for copyright infringement notices can reasonably  
14 in an operational and logistical manner be received and  
15 processed through the system.

16 The second opinion is that as I started to look  
17 through the system and the design here and then the  
18 specifications that they put in to make the design work,  
19 frankly, what happens is that the system looks like it's doing  
20 things, but what comes out the end is very little. The system  
21 as it gets configured by Cox may put a lot of stuff in, but  
22 nothing ever comes out the other end.

23 So the ultimate infringements are not fully and  
24 adequately processed.

25 Q. Okay. We'll talk about all that in detail in a moment.

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1 Before we get into the specifics of all that, did you  
2 arrive at an opinion as to whether Cox Communications and  
3 CoxCom can control infringement on their network?

4 A. Yes, I did.

5 Q. What is that opinion?

6 A. Well, two parts. One is that Cox has an AUP, a user  
7 policy, and it seems to me fairly clear, which says, don't  
8 infringe on copyrights and, oh, by the way, if you do, we have  
9 the right to suspend you or terminate you or take some action  
10 if that infringement persists above a level. Okay.

11 So it on the surface says, we have the right to take  
12 action if you infringe.

13 The second part of it is that I was reading  
14 Mr. Vredenburg's testimony from last week, and they actually  
15 have the ability to do it with the push of a button.

16 Q. What do you mean?

17 A. So if there's somebody who is infringing, they just push  
18 the button, the AUP goes into the modem, and off they go.

19 So they have both the right and the ability to take  
20 action.

21 Q. Thank you. I want to switch gears a little bit and talk  
22 about the Rightscorp notices.

23 What is your understanding of what Cox did with  
24 respect to the Rightscorp notices?

25 A. My understanding from, you know, the various materials



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1 that I have is that they just took them and threw them in the  
2 trash can. They blacklisted them. And they blacklisted them  
3 before it got anywhere near the system.

4 So it sort of came in, there was a router. They  
5 said, ah, this is Rightscorp, throw it into a black hole  
6 somewhere. And it wasn't even sent back to Rightscorp. So it  
7 just was trash-canned.

8 Q. What's your understanding as to why Cox chose to blacklist  
9 Rightscorp's notices?

10 A. Again, my reading of the material is that there was a  
11 settlement notice that Cox objected to on the Rightscorp  
12 notices.

13 Q. Okay. And can you tell us from an operational perspective  
14 what blacklisting means practically?

15 A. Blacklisting, at least with regards to the Rightscorp  
16 application, means that the notice doesn't even get into the  
17 system. It's stopped at the front and just don't even come in  
18 here. So you go off into some black hole in space and never  
19 return. And it stops you from ever having the claim go into  
20 the system effectively.

21 Q. And what's your understanding as to how Cox actually  
22 blacklisted -- I mean, from an operational perspective, what  
23 did they do with those notices?

24 A. From my understanding reading the record, is that they  
25 prevented Rightscorp e-mails from even entering the Cox e-mail

2007

1 server. So they would just when they -- probably hit the  
2 router before that, the router read it as a message from  
3 Rightscorp, and then off it went to nowhere.

4 Q. Do you have an opinion as to what types of things Cox  
5 could have done with Rightscorp's notices from an operational  
6 standpoint?

7 A. Yeah, I think so. You know, having been on the  
8 operational side of this before, what it could do -- well, it  
9 could have accepted the notices, but Cox didn't want to do  
10 that. So the first option was it could have just taken the  
11 notices and sent them forward. They didn't do that.

12 They could have taken the notice, stripped off the  
13 settlement offer, and sent that forward, if they objected to  
14 those words.

15 They could have stripped out the data that related to  
16 the infringement and then put it in a Cox format and sent that  
17 forward.

18 Or they could have at least taken the data into the  
19 system and put it somewhere until they figured out what to do  
20 with it.

21 So -- but instead they just went, goodbye, off it  
22 went.

23 Q. So what information have you reviewed that form the basis  
24 for the opinion you just gave?

25 A. I've reviewed various information on e-mails. I've

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1 reviewed documentation that indicated that -- from Mr. Zabek's  
2 group and the Abuse Group that those e-mails were just not even  
3 to go into the system and went off into a dead zone.

4 Q. Have you evaluated, again, from an operational  
5 perspective, what would have happened to Rightscorp's notices  
6 had Cox actually processed them through the system and treated  
7 them like the same as other complainants that Cox dealt with?

8 A. As I indicated before in my general opinion, it appeared  
9 to me based upon my analysis of the Cox system that what would  
10 happen is that very few of these infringement notices ever got  
11 to the system where they could be acted upon. And once acted  
12 upon, very few of them resulted in anything.

13 So, quite frankly, even if Rightscorp's notices had  
14 gone through in some shape or form, given the configuration  
15 they had that system in at the time, more than likely very  
16 little would have gotten through and been acted upon anyhow.

17 Q. So tell us a little bit about the configuration you're  
18 talking about. How was the system configured to prevent very  
19 few of the notices from actually moving through?

20 A. The way I understand it from the documents that have been  
21 presented to me, there seemed to be a bunch of hurdles that  
22 these things have to go through.

23 For example, blacklisted is a big hurdle. I mean, if  
24 you're blacklisted, you don't even start. So all of those get  
25 thrown to the side.

2009

1 But then the second hurdle is we're only going to  
2 only accept, say, 200 notices per day per entity. Okay? And  
3 so what if you have 300? What if you have 500? What if you  
4 have a thousand? What happens to the ones that exceed 200?  
5 They kind of lay around, but I can't figure out whether they  
6 ever really got processed.

7 Then the next hurdle that you have to go through is  
8 one where they only accept, I believe, one notice per day per  
9 subscriber. So if you have a subscriber who is, you know,  
10 aggressively downloading copyrighted material, and you only get  
11 one notice for that day, you may have missed a lot of other  
12 notices.

13 So there are these types of hurdles that you go  
14 through that were put in configurations in the system, you  
15 could configure it differently, but they were configured  
16 specifically to make certain that a lot of stuff came in and  
17 little, if anything, came out and went into what they call  
18 their graduated response system.

19 Q. So let me just make sure I understand. So when you're  
20 talking about configuring the system, can these hurdles be  
21 changed?

22 A. The system design allows you -- the design is a reasonable  
23 design, but then what they do is they put these configurations  
24 in. So you could, number one, not blacklist anybody, so all  
25 this stuff comes in.

1 Or you could take the 200 limit, make it 300, 400,  
2 500, a thousand. So, I mean, you know, that's another way in  
3 which you make it easier to get across these hurdles.

4 And you can say, well, you know, if somebody is  
5 really infringing, maybe that's really somebody you want to  
6 take a look at. So you may get rid of that one infringement  
7 per day per customer rule.

8 So, yes, just in that front portion there's a lot of  
9 things you can do to be more vigilant in terms of the  
10 infringement notices that come through.

11 Q. So how does the system, the system for dealing with  
12 infringement notices at Cox, how does that work for notices  
13 once they clear these hurdles you just mentioned, the  
14 blacklisting, the 200 daily limit, and the one limit per  
15 subscriber per day. What happens next?

16 A. At that point it goes into this graduated response system.  
17 And it's like a 13-step program. The first step, well, we  
18 won't pay attention to the first time you get an infringement  
19 notice. And then two, three, four, five, six, seven, we'll  
20 send you a little e-mail warning that you've made a problem.  
21 And then slowly we'll increase the warnings to suspensions, and  
22 maybe by the time we get to the 13th level, we'll consider you  
23 for termination.

24 So it's a very long process that is like another set  
25 of hurdles. All right. It's many, many steps with the chance

1 of, first of all, the message even getting to that point being  
2 fairly low, but by the time you've gotten to that point,  
3 getting up all these additional rungs of the ladder becomes  
4 extremely problematic.

5 Q. So what's your understanding of this six-month rolling  
6 window we've heard testimony about? Does that fit in here?

7 A. That's sort of the next thing. And that is that Cox has a  
8 six-month rolling -- moving average window. This window sort  
9 of moves along so that if you had your 12 violations and now  
10 your 13th comes in on the back end of that window, that's  
11 dropped. So you don't go to 13, you may go down to 11 or 10 or  
12 sometimes even lower.

13 And the problem with the six-month rolling window --  
14 again, that's another item which could be changed, you could  
15 make it a longer term. But the point is that the six-month  
16 rolling window starts to throw out at the back end chronic  
17 violators of copyright infringement.

18 Q. Well, is it your understanding that if you don't get 13  
19 steps within that six-month rolling window, that the counter  
20 resets?

21 A. Yes, it is.

22 Q. What evidence, if any, Dr. McGarty, have you seen that  
23 shows the effect of Cox's system to deal with infringement  
24 notices in practice?

25 A. I've seen some material in the interrogatories that Cox

1 provided, and I have used some of that information to make some  
2 calculations.

3 Q. Okay. Could you flip in your book, please, Dr. McGarty,  
4 to PXS 005.

5 A. PXS 005. Okay. I have that.

6 Q. Do you recognize this document?

7 A. That document is -- yes, I do.

8 Q. And what is your understanding of what this document is?  
9 Without getting into the details of it --

10 A. I'm sorry.

11 Q. -- just describe generally what it is.

12 A. Generally this document is just copying materials from  
13 Interrogatories 5 and 8 on to a single table.

14 Q. Interrogatories -- interrogatory answers provided by Cox?

15 A. Answered and provided by Cox, that's correct.

16 MR. ALLAN: I would move PXS 005 into evidence, Your  
17 Honor.

18 THE COURT: Any objection?

19 MR. BUCKLEY: Foundation. Did he prepare this?

20 MR. ALLAN: We can have a sidebar if you would like,  
21 Your Honor.

22 MR. BUCKLEY: Or you could ask him.

23 THE COURT: This exhibit?

24 MR. ALLAN: Yeah.

25 BY MR. ALLAN: (Continuing)

1 Q. Is this exhibit prepared from interrogatory answers that  
2 you are familiar with?

3 A. Yes, it was.

4 Q. Can you tell us how it was prepared.

5 A. Well, what I did was I took the tables in the two  
6 interrogatories and I just copied the columns, column one --  
7 well, Warnings, Suspensions, and Terminations. That data was  
8 copied into there, that's from one interrogatory.

9 And then from the other interrogatory I copied  
10 Notices in CATS, Deleted Notices Not Stored in CATS, and  
11 Auto-Closed into the second triad of columns.

12 THE COURT: It will be admitted.

13 MR. ALLAN: Thank you. If you would pull that up,  
14 please. Thank you, Karl.

15 BY MR. ALLAN: (Continuing)

16 Q. So I just want to make sure I understand the two  
17 interrogatories. Could you explain -- I guess let's start with  
18 the top three, Warnings, Suspensions, and Terminations. Could  
19 you tell us what these three columns represent.

20 A. I am going to have to switch to my reading glasses because  
21 as you get to a certain age, you can't do both of these.

22 Q. Fair enough.

23 A. I apologize to the Court and folks.

24 Q. I understand.

25 A. The first three columns are Warnings, Suspensions, and



2014

1 Terminations. Warnings are basically an e-mail sent to the  
2 subscriber that says there has been a complaint on copyright.

3 Q. Sorry, go ahead, please.

4 A. Okay. There has been a complaint on copyright.

5 Suspensions are when they send them into a concept  
6 they call, I believe, a walled garden where you have to talk to  
7 somebody.

8 And termination is when I gather something really  
9 happens.

10 So those are those three columns.

11 Q. Okay. And where did you compile the data that is  
12 comprised in these three columns? Where did you acquire that?

13 A. I acquired it from the interrogatories.

14 Q. From the interrogatories provided by Cox?

15 A. That's correct.

16 Q. Can we -- you take that down, please, Karl.

17 Now, let's go to just the Total column. How did you  
18 come up with the Total column?

19 A. All I did in the Total column there was to take Warning,  
20 Suspensions, and Terminations and added them up. It's the  
21 total number.

22 Q. Okay. Very good. And if we could just go back, Karl, and  
23 just show the date range, please. Thank you.

24 And what's the significance of this date range,  
25 Dr. McGarty?

2015

1 A. Oh, this is the period in which we are having this trial  
2 discussion about.

3 Q. Okay.

4 A. So it is the active period.

5 Q. Okay.

6 A. February 2012 through October 2014.

7 Q. Very good. Thank you. All right. So that information,  
8 the suspension, the warning, and the termination data during  
9 this time frame was provided by Cox in the interrogatory  
10 answers?

11 A. Yes.

12 Q. Now, could you walk us through the next set of columns  
13 here beginning with Notices in CATS, and include totals in  
14 that.

15 A. The next three columns are -- one is Notices in CATS.  
16 These are the notices that were introduced at that front end of  
17 CATS where you now have all these hurdles that you have to go  
18 over.

19 Deleted Notices are ones that got through the e-mail  
20 router I guess but said, no, we're not going to deal with you  
21 because these are blacklisted. These do not include the  
22 Rightscorp notices which were stopped even before they got to  
23 the e-mail server. Okay.

24 And then the Auto-Closed Notices are a de minimis set  
25 of things that are added on.

1 Q. Okay.

2 A. And as before, I added the three columns together so that  
3 the totals represent the sum of those three columns.

4 Q. Okay. Very good. Can we -- why don't we just take a  
5 month for an example. Let's go with May of 2014.

6 If you could just do that whole row, Karl.

7 A. I would try July. That's a pretty good one.

8 Q. July, whatever one you'd like.

9 A. Yeah, looks good.

10 Q. Dr. McGarty, so we have got the July data here pulled up.  
11 Can you walk us through what this information tells you.

12 A. Sure. In July, if you take a look at the July number -- I  
13 can see with these glasses -- there were 91,482 sent into CATS,  
14 260,750 blacklisted in CATS. 0. For a total of 352,232.

15 Q. So that's the total on the right-hand side highlighted in  
16 yellow?

17 A. It's -- yeah, it's under the Total down here, just before  
18 the Percentage column.

19 Q. Okay. Very good.

20 A. Okay. And that represents the total number of  
21 infringement notices that kind of came into the system. Some  
22 made it through or partially through, and the rest of them  
23 didn't get there.

24 It does not include, as I said before, the Rightscorp  
25 notices that were just spun off even before it got there.

1 Q. So let's just make sure we're talking about the same  
2 thing. So the 352,000 --

3 A. Correct.

4 Q. -- is it your understanding that that's all the  
5 infringement notices sent to Cox in July of 2014 by all  
6 copyright complainants not including Rightscorp?

7 A. That's what I am led to believe by the interrogatory.

8 Q. Okay. Very good. Now, take us to the front part, if you  
9 would.

10 A. In the same way you go through these numbers, July of  
11 2014, 24,404 received warnings, those little e-mails. 2,801  
12 had to call somebody up to get reactivated or the equivalent.  
13 And one person was terminated. Okay.

14 Q. Okay.

15 A. And that was for a sum of 27,206. So these were actions  
16 that the system took.

17 Now, all those infringement notices were sent in, but  
18 it resulted in 27,206 actions.

19 Q. Okay. Now, talk to us about these two columns, these two  
20 rows on the right, the Percentage of DMCA Complaints on the far  
21 right and then the --

22 A. Okay. If you take, if you take the number of things that  
23 were acted upon and divide it by the total number that were  
24 submitted, only 7.72 percent of what was submitted got acted  
25 upon. All right.

1           You subtract that from 100 percent, that meant that  
2   92.28 percent didn't get acted upon.

3           So these notices went in and were not acted upon.

4   Q.   Now, when you say "not acted upon," what do you mean?

5   A.   Well, it meant that they went in as valid infringement  
6   notices, and that the system had to do something with them.  
7   That's the way Cox describes the system. And the system seems  
8   to have only done something with about 7.7 percent of the  
9   complaints that were sent to it.

10   Q.   So what happened to the other 92.28 percent of complaints  
11   that were sent to Cox in July of 2014?

12   A.   They apparently were never acted upon. They fell by the  
13   wayside as the hurdles got jumped over.

14   Q.   Do you know whether or not any of the Cox subscribers that  
15   were the subject of those 92.28 percent of those notices  
16   learned that they were the subject of infringement notices?

17   A.   I do not.

18   Q.   Do you know whether or not these notices were just  
19   ignored?

20   A.   No.

21   Q.   Is it your understanding that they were just ignored?

22   A.   I am sorry, I didn't hear what you said. Do I know that  
23   they were ignored? The system --

24           MR. BUCKLEY: Speculation, Your Honor.

25           THE COURT: He has rephrased his own question and he

2019

1 is answering a different question now, and I am going to allow  
2 him to answer the question.

3 THE WITNESS: I am sorry. Could you repeat the  
4 question?

5 BY MR. ALLAN: (Continuing)

6 Q. What is your understanding of what happened to these other  
7 notices, the 92 percent of these notices?

8 THE COURT: If you have one.

9 Q. If you have one.

10 A. They were ignored.

11 Q. How was it that Cox was able to ignore so many of these  
12 notices?

13 A. Their system was configured to deliberately do that. They  
14 put enough hurdles in there that you could not get through the  
15 other end with these notices, or at least that's my evaluation  
16 based upon looking at the documents, the materials, and the  
17 data.

18 Q. Thank you. You indicated you had reviewed some  
19 deposition or -- sorry, some trial testimony in this case?

20 A. Yes, I have.

21 Q. Did you review Mr. Cadenhead's testimony?

22 A. Yes, I did.

23 Q. Are you aware of any testimony he gave concerning the fact  
24 that he believed that his system, that this system was  
25 effective?

1 A. Yes, I saw that.

2 Q. What was your -- what do you recall of that testimony?

3 A. I recall he said something to the amount of 96 percent  
4 effective, something in that range, if I recall the number.  
5 And that was in his testimony a week ago.

6 Q. Very good. Actually, before we go to that, Karl, if you  
7 could pull these out.

8 These numbers in the far right column, Dr. McGarty,  
9 are they all fairly consistent in terms of the percentages of  
10 notices that Cox didn't do anything with?

11 A. On average it looks like the number is 90, almost  
12 90 percent are sort of disregarded.

13 Q. Very good. Could we pull up what I believe is in  
14 evidence, DTX 141, please, Karl. If we could shoot over to  
15 number 14 of that, please.

16 A. I am sorry?

17 Q. It's number DTX 141, Dr. McGarty.

18 A. I have that. And page --

19 Q. It is page number 14.

20 A. -- 14. Okay. I have that. Thank you.

21 Q. And do you recall in your review of the testimony  
22 Mr. Cadenhead talking about this slide?

23 A. Yes, I do.

24 Q. And what's your understanding of Mr. Cadenhead's testimony  
25 on this?

1 A. My understanding is he made a statement that it's  
2 96 percent effective. But when I look at the numbers that were  
3 provided to me in the Cox interrogatories, which as an  
4 interrogatory I can rely upon those numbers because that was  
5 the representation made by Cox, I'm getting the impression that  
6 roughly 90 percent of the notices are just outright ignored.

7 So I have serious concerns as to the validity of this  
8 number.

9 Q. So do you agree with Mr. Cadenhead that the system is  
10 96 percent effective at reducing infringement?

11 A. There is no basis -- it flies in the face of the numbers  
12 that I have before me that were provided by Cox over and over  
13 again, over a long period of time. And there is no source or  
14 critical references as to where this information ever came  
15 from. So it just appears.

16 Q. So are you aware of any source material in your review of  
17 any of the records that support these figures?

18 A. Support Mr. Cadenhead's representation?

19 Q. Correct.

20 A. I have not been able to find any information.

21 Q. And why is it that there would be a disconnect? Why is it  
22 that Mr. Cadenhead's answers or view of the effectiveness of  
23 the system can't be accurate given the interrogatory answers?

24 MR. BUCKLEY: Leading.

25 THE COURT: It is leading.



1 THE WITNESS: I am sorry?

2 THE COURT: Rephrase the question.

3 MR. ALLAN: I'll rephrase, Your Honor.

4 BY MR. ALLAN: (Continuing)

5 Q. Do you have an opinion -- or what, if any, opinion do you  
6 have concerning whether this figure, the 96 percent  
7 effectiveness, can exist at the same time the interrogatory  
8 data exists? I mean, can they be mutually exclusive or can  
9 they relate?

10 A. I -- my opinion is that this is totally inconsistent with  
11 the facts that I have in evidence, and I have no way to justify  
12 this number at all.

13 Q. Having -- do you have an opinion as to whether the Cox  
14 system is effective in any way?

15 A. My opinion is, as I said earlier, is that the Cox system  
16 seems to act as if it is effective, but when you put in all of  
17 these hurdles and you take a look at the data that actually  
18 comes out of the system, it seems to be very ineffective in  
19 totality.

20 Q. Are you aware of Mr. Cadenhead's testimony on educating  
21 subscribers about infringement?

22 A. I am sorry, on --

23 Q. Educating subscribers.

24 A. Yes, I am.

25 Q. And what does the data you've looked at, including the

1 interrogatory answers, what does that tell you about the level  
2 of education Cox provides to its subscribers about  
3 infringement?

4 A. I think if you are disregarding almost 90 percent of the  
5 violations, that is not a good means of education. I think you  
6 should inform the violators as quickly as possible and  
7 repeatedly that they are violating and not give them the  
8 comfort that they can continue to violate with impunity.

9 Q. Have you seen any other evidence in your review of the  
10 materials or the trial transcript -- let me rephrase that.

11 What other evidence have you seen in your review of  
12 the trial transcripts and the evidence that would suggest that  
13 Cox's system is not effective at addressing infringement?

14 A. I have looked at some of the evidence that Mr. Vredenburg  
15 had last week where there was a multiple infringer, I believe  
16 28 times over some period of time, and he just, this particular  
17 individual just managed to infringe and infringe and  
18 infringe --

19 MR. BUCKLEY: Your Honor, legal opinion.

20 THE COURT: No, overruled. Go ahead.

21 THE WITNESS: May I continue, Your Honor?

22 THE COURT: Yes, sir.

23 THE WITNESS: Okay. I am sorry, you tried my eyes.

24 My hearing also gets to go.

25 THE COURT: I'm sorry.

1 THE WITNESS: And I still have my teeth.

2 So I -- could you repeat the question?

3 BY MR. ALLAN: (Continuing)

4 Q. Sure. What other evidence other than the interrogatories  
5 have you seen in reviewing the trial evidence and that sort of  
6 thing --

7 A. Right -- this is the Mr. Vredenburg discussion about the  
8 repetitive copyright abuser where I think there were about 28  
9 different abuses over a period of time and he was never  
10 proceeded to ultimate termination.

11 Q. And how does that factor into your opinion in this case?

12 A. Well, you know, it -- when I looked at that and I said,  
13 well, gee, maybe this fellow also had another 90 percent that  
14 we never got to see, or even probably more than that because we  
15 only caught him once a day. So this is a guy that I kind of  
16 see speeding down the highway every single day and we only  
17 catch him because we're looking on Thursday.

18 So the system, that being a classic example, seems to  
19 lack in the effectiveness it is supposed to have to be able to  
20 deter multiple violators.

21 Q. Dr. McGarty, do you have an opinion overall as to the  
22 design and the implementation of Cox's system to address  
23 copyright infringement on its network?

24 A. Just to sort of rephrase and give that opinion -- because  
25 the system was designed so it can do a lot of things. So the

1 design permits it to store as many infringements per day as  
2 possible, but when it's configured with the types of hurdle  
3 levels that we're talking about, the net result is it doesn't  
4 accomplish anything that it was set out to do. That it was  
5 almost deliberately configured not to lose customers from  
6 terminations and maybe to shield customers from any concerns  
7 regarding copyright violations.

8 MR. ALLAN: Thank you, Dr. McGarty. Pass the  
9 witness.

10 THE WITNESS: Thank you.

11 THE COURT: All right. Cross-examination.

12 CROSS EXAMINATION

13 BY MR. BUCKLEY:

14 Q. Good afternoon, Dr. McGarty. We haven't met. My name is  
15 Brian Buckley.

16 A. And I am sorry, counselor, but you will have to speak up  
17 because your voice is very soft and I can't hear it.

18 Q. I will do my very best.

19 A. I would appreciate it.

20 Q. Dr. McGarty, you are charging an hourly rate, I assume,  
21 for your work in this case?

22 A. Again, I really can't hear you. I am terribly sorry.

23 Q. Are you charging an hourly rate for your work in this  
24 case?

25 A. Yes, I am.

1 Q. What is your rate?

2 A. 650 an hour.

3 Q. And roughly how many hours do you estimate you have spent?

4 A. I have billed this year about 125,000. And generally what  
5 I do with that money is I send it to both Columbia and Memorial  
6 Sloan-Kettering for cancer research.

7 Q. My question was just how much.

8 A. Okay. 125,000, I believe, so far this year.

9 Q. At \$650 an hour?

10 A. That's correct.

11 Q. That work was all performed by you or do you have --

12 A. I am the only one.

13 Q. Michael, can we please pull up document PX 1344.

14 A. Do I have those in this book?

15 Q. You do. This was one that Mr. Allan asked you about on  
16 direct. It is PX 1344.

17 A. Okay. 1344?

18 Q. Yes.

19 A. Okay. This is the implementation plan.

20 Q. Yes. And, Dr. McGarty, it's also on the screen if that  
21 helps.

22 A. No, I'm going to have to work off of this. I'm sorry.

23 Q. Okay. So this -- you testified that this was one of the  
24 documents that you reviewed to help you understand how CATS  
25 works, right?

1 A. That's correct.

2 Q. Michael, could you advance to the page that ends in 3180,  
3 please.

4 Michael, could you please highlight that paragraph  
5 that says Document Summary?

6 Do you see that paragraph, Dr. McGarty, that says  
7 Document Summary?

8 A. Yes, I do.

9 Q. I am going to read that first sentence. "This document  
10 provides a detailed description of the hardware, software, and  
11 security configuration components of CATS abuse system being  
12 deployed to automate analysis and ticketing for all Internet  
13 abuse complaints for Charter Internet services."

14 Do you see that?

15 A. That's what it says, correct.

16 Q. Are you familiar with Charter?

17 A. I am very familiar with Charter.

18 Q. What is Charter?

19 A. Charter is another cable television company which I  
20 believe uses the Cox CATS system as well.

21 Q. Okay. So you were aware this was a Charter document?

22 A. It's a mix between Charter and Cox, and it was represented  
23 to me to be a document for CATS.

24 Q. It was represented to you to be a document for CATS?

25 A. On the front here, Cox document. The CATS system here.

1 Q. So are you aware that Charter has actually licensed the  
2 CATS system from Cox?

3 A. I was, I believe, familiar with that.

4 Q. Okay.

5 A. So this was a Cox system that Charter has licensed.

6 Q. Right.

7 A. Okay.

8 Q. But this document, is it your understanding this is a  
9 Charter document?

10 A. This document has a mishmosh of Charter and Cox all over  
11 it. So I don't know who it's with.

12 Q. Okay. So you don't know whether this relates to Cox's  
13 implementation of CATS as opposed to Charter's implementation  
14 of CATS?

15 A. Well, in my experience, if Cox built the system and then  
16 licensed it to Charter, then it was Cox's system licensed to  
17 Charter.

18 Q. Okay. Yeah, but my question was different. You don't  
19 know whether this document relates to Cox's implementation of  
20 CATS as opposed to Charter's implementation of CATS?

21 A. All I know, if I'm answering your question properly, is  
22 that this was the Cox system licensed, I guess, to Charter if  
23 you say so.

24 Q. Okay. You don't know one way or the other?

25 A. No.

1 Q. Are you aware that in 2012 Charter told Rightscorp it  
2 wouldn't process its notices?

3 A. No.

4 Q. Were you aware that Charter repeated that in 2013, told  
5 Rightscorp, we won't take your notices?

6 A. No, sir.

7 Q. Have you ever seen any communications from Charter to  
8 Rightscorp?

9 A. No, sir.

10 Q. Any communications from Charter to BMG?

11 A. No, sir.

12 Q. Are you aware that there are other ISPs who don't process  
13 Rightscorp's notices?

14 MR. ALLAN: Objection, Your Honor, scope.

15 THE COURT: Yeah.

16 MR. ALLAN: This wasn't covered at all in --

17 THE COURT: Yes. Sustained.

18 BY MR. BUCKLEY: (Continuing)

19 Q. So, Dr. McGarty, you've talked a lot about Cox's system  
20 for handling copyright complaints, right?

21 A. Yes.

22 Q. The CATS system?

23 A. Yes.

24 Q. And then you've also talked about CATS -- or Cox's  
25 graduated response system which is related to CATS, right?



1 A. Yes.

2 Q. And for the graduated response system, did you say that  
3 you reviewed Cox's methods and procedures document, do you  
4 remember that?

5 A. It was a document -- several documents on the graduated  
6 response system over a period of time where I think they may  
7 have gone from a maximum 11 to a maximum of 13. And I would  
8 have to go back and re-examine those documents, but, yes, I've  
9 seen those.

10 Q. So prior to this case, had you ever evaluated a graduated  
11 response system?

12 A. I don't know if I've ever seen that as a term of art. So,  
13 I mean, I know in various systems that I've had, for example,  
14 on billing, we would have a graduated response where if the --  
15 the patient. Whereas the customer did not pay within 30 days,  
16 we would do something, and then 45 days.

17 So I've seen graduated responses, if that's the type  
18 of question you're asking.

19 Q. Well, my question was more specific to copyright  
20 complaints. Had you ever --

21 A. No.

22 Q. Okay. You hadn't previously evaluated --

23 A. No, sir.

24 Q. It's really important that you let me finish my question.

25 A. I'm sorry.

1 Q. And I'll let you finish your answer so we don't talk over  
2 each other.

3 A. Yes, sir.

4 Q. Okay. So had you ever helped develop a system for  
5 responding to copyright complaints?

6 A. No, sir.

7 Q. You testified a little about Rightscorp, right?  
8 Rightscorp?

9 A. Yes.

10 Q. Do you have an understanding of how Rightscorp's system  
11 works?

12 MR. ALLAN: Objection.

13 A. I have general information about -- I'm sorry.

14 THE COURT: What was the objection?

15 MR. ALLAN: Beyond the scope.

16 THE COURT: No, I'll allow the question. He talked  
17 about having studied the Rightscorp system, and we'll see where  
18 you're going. Let's go.

19 BY MR. BUCKLEY: (Continuing)

20 Q. I'm sorry. My question was just do you have an  
21 understanding of how Rightscorp's system works?

22 A. I have a general understanding of how the Rightscorp  
23 system works from their material and from testimony last week  
24 at trial.

25 Q. Did you actually evaluate the reliability of the

1 Rightscorp system?

2 A. No, sir.

3 Q. Okay. Did you evaluate the reliability of the Rightscorp  
4 notices?

5 A. No, sir.

6 Q. Do you know how the notices are generated?

7 A. I'm familiar with the testimony of -- from testimony how  
8 it's allegedly generated. I have no personal firsthand  
9 knowledge as to how it is generated.

10 Q. Okay. Do you understand from listening to the testimony  
11 that what the Rightscorp system does is it observes data  
12 associated with IP addresses, like a date, a port, a file name,  
13 that sort of thing?

14 A. As I indicated, I have no personal firsthand knowledge of  
15 how Rightscorp functions.

16 Q. Okay. Do you know whether Rightscorp is able to identify  
17 the person associated with a particular IP address?

18 A. That I'm familiar with. That you can get an IP address  
19 and a port address and other addresses. To determine what  
20 individual is involved requires the participation of the ISP  
21 who has that information.

22 Q. Okay. So but Rightscorp doesn't know?

23 A. No, sir, not to my knowledge.

24 Q. Is it consistent with your understanding that what the  
25 Rightscorp system is doing is observing folks using BitTorrent?

1 A. That is my understanding of how Rightscorp functions, yes,  
2 sir.

3 Q. Okay. And the notices themselves are allegations of  
4 infringement or allegations of BitTorrent use, right?

5 A. I don't -- I cannot make a statement one way or another as  
6 to the veracity of that allegation.

7 Q. Okay. And you wouldn't -- you also wouldn't offer an  
8 opinion as to whether those notices are proof of copyright  
9 infringement?

10 A. I'm not testifying -- I'm testifying purely on operational  
11 issues on the Cox side.

12 Q. You know -- you're familiar with open WiFi, that concept?

13 A. Very much so.

14 MR. ALLAN: Objection, Your Honor. This is far  
15 beyond the scope.

16 THE COURT: Yeah, way outside. Sustained.

17 BY MR. BUCKLEY: (Continuing)

18 Q. Are you offering any opinion on what a repeat infringer  
19 is?

20 A. Am I -- what a repeat infringer is?

21 Q. Yes.

22 A. I can only say what it means in plain words.

23 Q. Are you offering an expert opinion on that?

24 A. No, sir.

25 Q. Are you offering any expert opinion on the appropriate

1 circumstances for terminating a repeat infringer?

2 A. No, sir.

3 Q. Are you aware that Cox does occasionally terminate  
4 subscribers for receiving multiple infringement notices?

5 A. I believe the evidence I showed just previously  
6 demonstrates that Cox does terminate, yes, sir.

7 Q. Are you aware of any other ISPs that do that?

8 A. I have no knowledge of other ISPs.

9 Q. Dr. McGarty, let's look at your exhibit, the chart you  
10 prepared, which is PXS 0005.

11 A. Which one is that, sir?

12 Q. It's the chart that you prepared from the interrogatories.

13 A. Yes, sir.

14 Q. And you said that the data that's reflected here came from  
15 Cox's Interrogatories No. 5 and 8, right?

16 A. That's correct.

17 Q. Michael, could can we pull up Interrogatory 8, too,  
18 please. Interrogatory 8, yes, which I believe is document PX  
19 1610.

20 So this is hard to see, Dr. McGarty, and it's hard  
21 for me to see too.

22 A. This is at a focal length which works with nothing I have  
23 the left in my eyes.

24 Q. Yes. And I'm having to do the same thing. So I'm going  
25 to have Michael expand a couple of these pieces here.

1 A. I see.

2 Q. So down in the corner, Michael, if you could bring up  
3 Dr. McGarty's chart first down here so we can see it.

4 So, Dr. McGarty, you focussed on the time frame from  
5 February 2012 through October 2014; is that right?

6 A. That's correct.

7 Q. And you've got the data tallied up there from the  
8 interrogatory?

9 A. That's correct.

10 Q. Then if you can go back, Michael, go back to the range for  
11 2010.

12 And, Dr. McGarty, you didn't include the Cox data  
13 from the year 2010; is that right?

14 A. No, I just focussed on February 2012 to 2014.

15 Q. Can you expand that over, Michael, for all the columns  
16 there?

17 In the interrogatory, Dr. McGarty, you see there were  
18 also -- there's data for 2010 for Warning, Suspensions,  
19 Terminations, right?

20 A. Yes, I'm aware of that data as well.

21 Q. Okay. And there are quite a few more terminations  
22 involved there?

23 A. I understand that.

24 Q. Okay. And then you also didn't include the data for 2011;  
25 is that right?

1 A. No, sir, I did not.

2 Q. Okay. Can you pull up that next page, Michael.

3 That carries over to the next page. There's a column  
4 for Terminations, there are quite a few more terminations in  
5 that -- in those columns too, right?

6 A. That's correct.

7 Q. Okay. And then at the end you cut it off at October 2014,  
8 but there was additional data in the interrogatory, right?

9 If you can bring up the one in the upper right  
10 corner, Michael, please. Thank you.

11 You see there's some data at the end there after  
12 October 2014 that you didn't include?

13 A. I'm just trying -- I'm sorry, hold on. I see 2013. You  
14 said 2015? I see 2015, that's right. I guess after the suit  
15 was filed suddenly it jumps up again.

16 Q. Those rows at the end. What's your understanding when the  
17 suit was filed?

18 A. Wasn't the suit filed at the end of 2014 with Cox?

19 Q. Yeah. Do you know when?

20 A. I think it was October, November time frame.

21 Q. But you didn't include this data here, right?

22 A. No, I didn't. I just went to that date.

23 Q. Okay. So let's go back to your chart, please, Michael.

24 So, Dr. McGarty, you've got the columns for Warnings,  
25 Suspensions, Terminations. You looked at part of the data, but

1 not all of the Cox data, there was more that we just looked at?

2 A. There's data prior to that and there's data subsequent to  
3 this time period, you're correct.

4 Q. Did you add up all of the data that was provided in  
5 Interrogatory 8 to determine how many total warnings are at  
6 issue?

7 A. Not in this chart, no, I didn't.

8 Q. Did you do that for suspensions?

9 A. No, I did not.

10 Q. Did you do that for terminations?

11 A. No, I did not.

12 Q. So in your chart, Dr. McGarty, you've got a column -- can  
13 you expand the column titles, please, headings.

14 You have a column -- there's a column that says  
15 Notices in CATS, right?

16 A. Yes.

17 Q. And then another that says Deleted Notices Not Stored in  
18 CATS, do you see that?

19 A. Correct.

20 Q. Are you familiar from your review of Cox's graduated  
21 response, are you familiar with the concept of hold for more?

22 A. I've seen that concept in those documents, yes.

23 Q. What's your understanding of that concept?

24 A. It's held for more infringement complaints.

25 Q. Okay. So the notice comes in?



1 A. And you hold it for a period of time.

2 Q. And wait to see if there's a second complaint?

3 A. That's right.

4 Q. Okay. Do you know or is it your understanding that the  
5 hold for more would be included in the Deleted Notices column?

6 A. I'm not familiar with that, no.

7 Q. You don't know one way or the other?

8 A. No.

9 Q. Did you ask?

10 A. I read the -- all I did was read the interrogatory in its  
11 detail. We discussed it. And the way it's described in the  
12 interrogatory is that it's blacklisted. And I assumed the term  
13 consistent with other blacklisting terms.

14 Q. So if a notice is held for more, do you know whether a  
15 CATS ticket is created for it?

16 A. A ticket in the system?

17 Q. Uh-huh.

18 A. The ticket is created in the database, in the MySQL  
19 database.

20 Q. Okay. So then presumably a hold for more ticket would not  
21 be included in the Deleted Notices column?

22 A. I'm not certain.

23 Q. You talked about the concept of hard limits?

24 A. Yes, sir.

25 Q. That's where if a certain number of notices come in from a

1 complainant when they hit a particular limit, the notices above  
2 that limit aren't processed, right?

3 A. That's correct.

4 Q. Do you know whether hard limit notices are included in the  
5 Deleted Notices column?

6 A. I don't know.

7 Q. You don't know?

8 A. No.

9 Q. So you don't know whether tickets are created for those  
10 notices?

11 A. The system seems to have the capability to create a data  
12 record in the file for those tickets, but they don't seem to be  
13 acted upon in terms of the cumulative response.

14 Q. Okay. But what you don't know is whether they --

15 A. I don't know the specifics.

16 Q. -- turn into a ticket or not?

17 A. No.

18 Q. And then you used -- so can you expand back out from the  
19 table, Michael? Let's see the whole chart if we could.

20 Thanks.

21 And then, Dr. McGarty, you used the numbers in these  
22 various columns and you came up with these percentages on the  
23 right over here, right?

24 A. Yes, sir.

25 Q. Are you a mathematician?

1 A. Am I mathematician?

2 Q. Yeah. Is that your expertise?

3 A. Surprisingly, my first book was on Stochastic Systems and  
4 State Estimation, which is pure mathematics from MIT, so -- and  
5 my minor was in mathematics at MIT. And everything I do is  
6 circling around mathematics.

7 Q. So that's why you were asked to do the math in this table?

8 A. I do this every day of my life, yes.

9 Q. I'm just wondering whether this was the expertise you  
10 brought to bear or whether someone else --

11 A. Doing the columns and adding?

12 Q. Yeah.

13 A. Yes, I know how to use Excel.

14 Q. Let's go back to this column that's titled Deleted Notices  
15 Not Stored in CATS.

16 A. Correct.

17 Q. Do you know -- so there's a number of months here and then  
18 there's a total at the bottom, it looks like it's about -- I'm  
19 having the same eyesight problems.

20 A. It's almost 3 million.

21 Q. 4.6 million it looks like.

22 A. Oh, the total. Oh, that number, yes, 4. -- sorry.

23 Q. I think it's 4.6 million.

24 A. We're going to go do this all day, I apologize.

25 4.7 million. Now I can't see the jury.

1 Q. What percentage of those, of that 4.6 million notices are  
2 Rightscorp notices?

3 A. None.

4 Q. How do you know that?

5 A. There was a correspondence I had seen in an e-mail back  
6 in, I think, November of 2011 from one of the people in the  
7 Abuse Group that basically it seems to configure it so that  
8 when the e-mail from Rightscorp comes in, there's a router in  
9 front of the e-mail server, it reads the address as Rightscorp,  
10 and then sends it off to Neverland. And only the ones that are  
11 allowed to go through end up in the e-mail server.

12 Q. And you're basing that on an e-mail from 2011 you say?

13 A. Yes, one of the inside people. I think that's when I saw  
14 it.

15 Q. And do you know whether that's still in effect?

16 A. I don't know.

17 Q. Do you know that Rightscorp claims to have sent Cox over  
18 22 million notices?

19 A. I have no idea.

20 Q. Okay. So you don't know for a fact whether there are any  
21 Rightscorp notices in that figure, do you?

22 A. In this particular time period?

23 Q. Right.

24 A. Cox may have changed its procedures. So --

25 Q. Do you know whether there are other blacklisted entities

1 that are reflected in this Deleted Notices column?

2 A. It was characterized as such I believe in the  
3 interrogatory.

4 Q. That these, in fact, reflect --

5 A. Some blacklisted, yes.

6 Q. -- entities that have been blacklisted?

7 A. Yeah. But what they do is apparently they come through  
8 the router and into the e-mail system, so Cox accepts them, but  
9 then doesn't do anything with them.

10 Q. Okay. But these are entities that Cox has blacklisted?

11 A. Yes.

12 Q. That's your understanding?

13 A. Yes.

14 Q. Have you heard of a company CEG TEK, C-E-G T-E-K?

15 A. I'm sorry. CEG TEK?

16 Q. CEG TEK, C-E-G T-E-K.

17 A. No, sir.

18 MR. ALLAN: Objection, Your Honor, scope.

19 THE COURT: Do you want to approach the bench on  
20 this?

21 MR. BUCKLEY: I'm just asking him about what this  
22 column means and what the numbers mean. It's his chart and he  
23 testified about it under oath.

24 THE COURT: Is this your last question on the  
25 subject?

1 MR. BUCKLEY: On CEG TEK? He said he wasn't familiar  
2 with CEG TEK, so yes.

3 THE COURT: Okay.

4 BY MR. BUCKLEY: (Continuing)

5 Q. Okay. So you know -- okay. So this column reflects  
6 entities that were blacklisted. Do you know why any of those  
7 entities were blacklisted?

8 A. No, sir.

9 Q. Do you know whether they're still blacklisted?

10 A. No, sir.

11 Q. Did you ask?

12 A. No, sir.

13 Q. Does this chart just reflect notices related to copyright  
14 abuse?

15 A. I'm sorry.

16 Q. Do the numbers on this chart just reflect notices related  
17 to copyright?

18 A. That's the way the interrogatory phrased it, correct.

19 Q. Okay. But you understand Cox gets other types of notices  
20 too?

21 A. Absolutely.

22 Q. But they're not reflected here?

23 A. Not the way the representation was made to me in reading  
24 that particular interrogatory.

25 Q. So you testified on direct that you have an understanding

1 of why Cox chose to blacklist Rightscorp, right?

2 A. Yes.

3 Q. And that's because Rightscorp's notices included  
4 settlement language?

5 A. That's what I testified to.

6 Q. And you suggested, Dr. McGarty, that Cox could have just  
7 taken those notices and taken the settlement language out of  
8 them, right?

9 A. Yes.

10 Q. Michael, could you please pull up DTX 69.

11 Dr. McGarty, this is a Rightscorp notice that is  
12 already in evidence. It is DTX 69.

13 Do you see that language right at the top? "Note to  
14 ISP, please forward the entire notice."

15 Have you seen that before?

16 A. Yes, I have seen this.

17 Q. Do you know if Rightscorp ever gave Cox permission to  
18 modify its notices?

19 A. I have no idea.

20 Q. Do you know if BMG ever gave Cox permission to notify its  
21 notices?

22 A. I have no idea.

23 Q. Are you aware that Cox repeatedly asked Rightscorp to  
24 modify its own notices?

25 A. I am not familiar with that.

1 Q. Do you understand that Rightscorp's business model depends  
2 on consumers contacting Rightscorp in response to notices like  
3 this?

4 MR. ALLAN: Objection.

5 A. I am not aware of details of Rightscorp's --

6 THE COURT: Overruled.

7 Q. I'm sorry?

8 THE COURT: He said he is not aware.

9 A. I am not aware.

10 BY MR. BUCKLEY: (Continuing)

11 Q. Dr. McGarty, on direct you talked about some testimony  
12 from Roger Vredenburg, who is a Cox employee, right?

13 A. Correct.

14 Q. And he was asked about an example of a Cox subscriber  
15 where there were different instances of complaints of various  
16 sorts, right?

17 A. That's correct.

18 Q. And those weren't all copyright-related complaints, right?

19 A. No, there were -- he had a various set of collection. He  
20 had copy other, which is a copyright, and then a whole bunch of  
21 other things were in there as well.

22 Q. And those copy other complaints, what that reflects is  
23 that this individual was using BitTorrent, right?

24 A. I am sorry, what the copy other reflects is --

25 Q. As I asked you before, what those notices reflect is that



1 that individual was using -- or somebody at that IP address was  
2 using BitTorrent?

3 A. Somebody at that IP address had a copyright violation  
4 filed.

5 Q. Right.

6 A. They could use BitTorrent or other peer-to-peer systems, I  
7 would assume. I don't know whether Rightscorp solely monitors  
8 BitTorrent and not the others. So I am not in a position to  
9 opine that it's solely BitTorrent.

10 Q. Okay. That's fair. So what those notices reflect is that  
11 some computer associated with that IP address was using some  
12 kind of file sharing program that Rightscorp monitors?

13 A. That's correct.

14 Q. Cox can't block a person's access to BitTorrent, right?

15 A. No.

16 Q. You feel pretty strongly about that?

17 A. I feel very strongly about that.

18 Q. Is that related to this notion of net neutrality?

19 A. I am a very strong proponent of net neutrality from that  
20 perspective.

21 Q. In fact, I think once you said net neutrality is simply  
22 that the carrier shall not in any way look at my data or  
23 discriminate in my transmissions based solely on its content,  
24 right?

25 MR. ALLAN: Objection, Your Honor. Scope.

1 THE COURT: Sustained.

2 MR. BUCKLEY: Well, Your Honor, he just said --

3 THE COURT: Come to the bench.

4 THE WITNESS: Is that it?

5 THE COURT: No, we are going to have a little  
6 conference.

7 THE WITNESS: What do I do?

8 NOTE: A side-bar discussion is had between the Court  
9 and counsel out of the hearing of the jury as follows:

10 AT SIDE BAR

11 THE COURT: All right. So we got out the information  
12 that he understands that BitTorrent can't be sued.

13 MR. BUCKLEY: No, no, no. That Cox can't block  
14 somebody's access to BitTorrent.

15 THE COURT: Right. So he said that. So, I'm sorry,  
16 I misspoke. He has already testified to that. So where are  
17 you going now?

18 MR. BUCKLEY: I've got a couple more questions on  
19 that front. I won't take it very far, but he has got -- he is  
20 very outspoken and has published on the fact that ISPs are not  
21 supposed to block BitTorrent or look at what their customers  
22 are doing.

23 THE COURT: This case is not about blocking  
24 BitTorrent, right?

25 MR. BUCKLEY: They have made this case all about

1 BitTorrent being -- equating to infringement, and created the  
2 suggestion that Cox should do something about that and  
3 supervision, and we have the right to rebut those things.

4 THE COURT: Okay.

5 MR. ALLAN: Your Honor, we didn't discuss net  
6 neutrality on his direct examination. We didn't discuss  
7 ability to block BitTorrent or block particular Web sites.  
8 This is completely outside the scope of his direct examination,  
9 and it is wholly irrelevant to the case.

10 The question in the case is what they did with  
11 respect -- or didn't do with respect to the notices of  
12 infringement that were sent to them. And it's clear with  
13 respect to the issue of Rightscorp that they did nothing.

14 And so, I don't think it's appropriate  
15 cross-examination and testimony for this witness.

16 And one related issue, because we keep going outside  
17 the scope on the cross-examination here. The testimony you  
18 elicited from the -- on the ticket, he kept saying it was  
19 Rightscorp information. None of that was Rightscorp  
20 information. Rightscorp notices haven't been addressed at all.

21 And so, there is a lot of misleading questions going  
22 on here, Your Honor.

23 MR. BUCKLEY: Which I'm sure you will point out on  
24 redirect.

25 THE COURT: You will clean that up on redirect.

1           You know, the allegation from day one that Cox's  
2 failure to use the DMCA or to use any system to stop  
3 infringers, infringing customers by using the BitTorrent, has  
4 never been about whether BMG had the authority -- had the  
5 authority to close down BitTorrent. It has been Cox's ability  
6 and -- you know, I know we are running right into the jury  
7 instruction on supervision, but the supervision is over its own  
8 customers.

9           And so, how does this testimony about what may or may  
10 not be permissible with regard to the BitTorrent site have  
11 anything to do with that?

12           MR. BUCKLEY: That's two separate issues.

13           THE COURT: Do you want to discuss with your  
14 client -- you can't both be talking. I can hear both -- half  
15 of what each of you are saying, and none of it in total. So  
16 you need a minute to confer? Take a minute.

17           MR. BUCKLEY: So, Your Honor, there are two issues.  
18 The first relates to BitTorrent specifically. They had every  
19 expert and witness they could say BitTorrent is used for  
20 99 percent infringing activity.

21           THE COURT: Okay.

22           MR. BUCKLEY: So they have created this impression  
23 that there is a bunch of BitTorrent activity on the Cox  
24 network. They have created this impression for the jury. We  
25 know there is all this bad stuff going on, and the implication

1 is we should do something about it.

2           They have now put up this expert to talk about how  
3 crappy their system is. He has a very strong opinion that  
4 there isn't anything we can do about BitTorrent. I think it is  
5 fair to round out the BitTorrent story through him. All I may  
6 need to do -- I can ask one more question, should we block  
7 BitTorrent.

8           Then there is a separate question of our ability to  
9 supervise, and it is the ability to supervise infringing  
10 activity. And all I want to ask him is, do you think we should  
11 be looking at our customers' data? Because their expert is  
12 going to say no.

13           And that does go to our ability to figure out what  
14 people are actually doing on our network. Even the guy that  
15 they have talked about through Mr. Vredenburg, nobody knows  
16 what he was actually doing.

17           THE COURT: It's completely misleading on what the  
18 case is about. It is not about whether you are permitted to  
19 look at your own customers' data.

20           It's the fact that you got notices saying that  
21 somebody else had looked at the data, that they believed there  
22 was infringing activity, indicating that your customers had  
23 used a BitTorrent site to illegally upload or download  
24 infringing material. So --

25           MR. BUCKLEY: And we were just supposed to take them

1 at their word on it and shut them off, shut the subscriber off  
2 without any ability to look into that, figure out whether it is  
3 true or not?

4 MR. ALLAN: That's what they do with everyone, Your  
5 Honor. I mean, this argument just doesn't make any sense.

6 THE COURT: That is a complete side show. So  
7 objection sustained. Your exception is noted.

8 MR. BUCKLEY: Okay. Thank you, Your Honor.

9 NOTE: The side-bar discussion is concluded;  
10 whereupon the case continues before the jury as follows:

11 BEFORE THE JURY

12 THE COURT: So we were talking behind your back that  
13 entire time. All right. I just wanted to let you know there.

14 THE WITNESS: Thank you. I couldn't hear it anyhow,  
15 so don't worry.

16 THE COURT: Go ahead.

17 MR. BUCKLEY: Can I ask my one follow-up question to  
18 make sure I got --

19 THE COURT: No, we're done. Move on to your next  
20 topic, please.

21 MR. BUCKLEY: Okay. All right.

22 BY MR. BUCKLEY: (Continuing)

23 Q. Dr. McGarty, just a couple of quick questions about CATS.  
24 Did you actually look at the CATS source code?

25 A. The Cox source code?

1 Q. The CATS source code.

2 A. CATS source code? No, sir.

3 Q. Are you aware that it was produced in this case?

4 A. I read the testimony at the beginning of  
5 Frederiksen-Cross, I believe, and she examined that. I am not  
6 capable of doing that.

7 Q. Do you know why Cox -- when you testified before about the  
8 hard limits that applied, do you know why Cox chose particular  
9 hard limits rather than others?

10 A. No, sir.

11 Q. Are you aware that Cox works with some rights holders and  
12 negotiates those hard limits?

13 A. I am familiar that Cox had conversations with some rights  
14 holders about the numbers. It is not clear to me whether those  
15 were negotiated as I would use the term "negotiated."

16 Q. Okay. You just don't know one way or the other?

17 A. I know the numbers were there. I know they were the  
18 result of conversations. I don't know if that would, in my  
19 view, be a typical negotiations.

20 Q. Dr. McGarty, you said on direct that Cox has the ability  
21 to control its subscribers' activity because it can terminate  
22 their Internet access, right?

23 A. That's correct.

24 Q. That's the nature of the control?

25 A. You turn off the modem that turns off the access.

1 Q. And that's true of every ISP, right?

2 A. To my knowledge, that's -- yes, that's -- that's an  
3 interesting question. If I -- may I speak towards it to try to  
4 resolve an answer?

5 Q. Let me ask it differently.

6 A. Excuse me.

7 Q. Let me ask it differently.

8 A. Okay.

9 Q. Is that true of every, what you call, traditional ISP like  
10 Cox?

11 A. To my knowledge, it's true of every cable company that  
12 provides DOCSIS-based ISP services.

13 Q. That the way to control a subscriber --

14 A. That's correct.

15 Q. -- is to turn off their Internet?

16 A. That's correct.

17 MR. BUCKLEY: Thank you. No further questions, Your  
18 Honor.

19 THE WITNESS: Thank you.

20 THE COURT: Redirect?

21 MR. ALLAN: Yes, Your Honor. Thank you. Can we pull  
22 up, Karl, PXS 005, 005 PXS?

23 REDIRECT EXAMINATION

24 BY MR. ALLAN:

25 Q. Just going back to this exhibit, Dr. McGarty. Mr. Buckley



1 asked you several questions about Deleted Notice Not Stored in  
2 CATS. Do you see that?

3 A. Yes, I see that.

4 Q. What's your understanding of what's contained within that  
5 column?

6 A. I think it would be useful maybe to go to the document  
7 itself and see exactly how Cox characterized it. Can I do  
8 that?

9 Q. Can we pull up -- it's PX 1622 in your book, Dr. McGarty.

10 A. Which one?

11 Q. PX 1622.

12 A. 23.

13 Q. 22.

14 A. 1622.

15 Q. Yes, sir.

16 A. Hold on. I have 1610. 1622.

17 Q. That's it right there. 1622.

18 A. 1622. Okay.

19 Q. Okay. Let's go to page 12, if we could, Karl.

20 A. Okay.

21 Q. And just to orient you, this is kind of split between two  
22 different pages, between 12 and 13.

23 Does this -- maybe you can read for the jury the  
24 sentence beginning, "E-mail notices received."

25 Do you see that third line?

1 A. Yes. "E-mail notices received at abuse@cox.net that  
2 relate to alleged copyright infringement are handled in one of  
3 two ways. If the sender is not blacklisted, the notice is  
4 entered into the Cox CATS system; the second column in the  
5 table below reflects those notices."

6 And that's the columns that says notices in CATS.

7 Q. Okay.

8 A. "If the sender is blacklisted, the e-mail notice is  
9 automatically deleted and not entered into the CATS system,  
10 with the exception explained below."

11 So if it is blacklisted, it doesn't go into the CATS  
12 system, with an exception.

13 Q. Okay.

14 A. Okay. "The third column in the table reflects those  
15 notices."

16 So those notices are blacklisted notices that  
17 apparently go nowhere except for what is described  
18 subsequently.

19 "Cox only has data for those automatically deleted  
20 notices beginning in mid-May 2010."

21 Again, if you look at the original table, there is no  
22 notices for them at all because they were gone.

23 Q. Just pause one moment for me, Dr. McGarty. I want to  
24 highlight this next sentence, Karl, beginning, "The figures in  
25 the third column."

1           Could you read that for the jury, please,  
2 Dr. McGarty.

3 A.     Which one now?

4 Q.     The sentence beginning, "The figures" --

5 A.     "The figures in the third column in the table below do not  
6 reflect e-mail notices that were not received at abuse@cox.net  
7 because those notices were blocked by Cox at the mail server."

8           I believe that refers to the Rightscorp notices that  
9 the front end just sends them off to nowhere.

10 Q.    Okay. So is that the portion of the interrogatory answer  
11 that leads you to believe --

12 A.    That's one of them, that's correct.

13 Q.    Very good. And in this sentence you just read, is it your  
14 understanding that that is referring to the third column being  
15 Deleted Notices Not Stored in CATS?

16 A.    That's correct.

17 Q.    Okay. And just so -- again, so we are all very clear,  
18 what is your understanding of what all of this data in here  
19 shows?

20           And if you could just drop down and show a little bit  
21 of the chart, please, Karl.

22           Who are the complainants that are providing -- that  
23 are sending in these notices?

24 A.    Who are the complainants who are providing these notices?

25 Q.    Right.

1 MR. BUCKLEY: Foundation.

2 MR. ALLAN: Let me rephrase, Your Honor.

3 BY MR. ALLAN: (Continuing)

4 Q. Do you have an understanding as to whether this chart  
5 contains the data for all of the complainants, copyright  
6 complainants that have sent copyright notices to Cox other than  
7 Rightscorp?

8 A. To my knowledge, Rightscorp was the only one blocked from  
9 even getting into it, but I don't know if Cox had similarly  
10 blocked other complainants in a way it blocked Rightscorp.

11 Q. So there may have been other companies blocked at the  
12 server level?

13 A. Yes.

14 Q. Mr. Buckley asked you some questions about the Rightscorp  
15 system. Were you asked to evaluate the Rightscorp system at  
16 all?

17 A. Not at all.

18 Q. Do you have an opinion on the Rightscorp system?

19 A. I have no adequate knowledge and no ability to make an  
20 opinion.

21 Q. And just while we are on this, he also asked you whether  
22 hold for more is stored in the Deleted Notices Not Stored in  
23 CATS. Have you seen anything -- what, if anything, have you  
24 seen in the interrogatory answers that indicate that would be  
25 the case?

1 A. I see nothing to indicate that to be the case.

2 Q. Do you under -- is it your understanding that the CATS  
3 system can create a ticket for a notice of infringement that is  
4 not otherwise acted on?

5 A. I am sorry --

6 Q. Let me rephrase the question. Do you have an  
7 understanding as to whether the CATS system can create a ticket  
8 for a notice of infringement that might get filtered out  
9 through one of the hurdles you mentioned in your direct  
10 examination?

11 A. My understanding is that the CATS system cannot do that,  
12 no.

13 Q. Do you have an understanding as to what Cox -- how Cox  
14 defines the term "process"?

15 A. Defines the term "process"?

16 Q. Correct.

17 A. In what context?

18 Q. Are you familiar with Mr. Carothers' testimony in this  
19 case?

20 A. Yes, I am.

21 Q. Do you have an understanding as to whether he testified  
22 that process means not process?

23 A. I have seen those e-mails --

24 MR. BUCKLEY: Your Honor, mischaracterizes --

25 THE COURT: Overruled. You can answer the question.

1 A. I have seen those e-mails go back and forth. I think I --  
2 yes, I do.

3 BY MR. ALLAN: (Continuing)

4 Q. On cross-examination Mr. Buckley also showed you a number  
5 of terminations in the 2010 and 2011 time frame. Do you recall  
6 that?

7 A. That's correct, yes.

8 Q. Do you have an understanding as to whether those were  
9 actually real terminations of subscribers?

10 A. I've seen information going back and forth in e-mails that  
11 there was a habit of terminating, and then turning the customer  
12 back on again, and recording that as a termination, but never  
13 really doing so.

14 Q. Let me hand you PX 1456, if I may.

15 A. 1456.

16 Q. If you could pull that up, Karl.

17 This is already admitted, Your Honor.

18 Dr. McGarty, do you recall this as the ticketing  
19 document you were asked about on cross-examination?

20 A. Yes, I've seen this.

21 Q. And Mr. Buckley asked you some questions about whether  
22 this document contained ticketing information on Rightscorp  
23 notices, do you remember that?

24 A. Yes, I do.

25 Q. Do you know whether or not any of the notices or any of

1 the tickets that were created here were created based on  
2 Rightscorp notices?

3 A. I believe at that time Rightscorp had already been  
4 blacklisted and wasn't going into the system.

5 Q. And again, looking at this ticketing history with all the  
6 Sent Warnings DMCA -- if we can scroll down on that, Karl,  
7 please.

8 How, if at all, does this impact your opinion in the  
9 case?

10 A. This is a multiple repeated offender that just keeps  
11 offending and offending and never seems to reach an end. And  
12 some of the offenses are significant.

13 And the other thing is that some of the levels to  
14 which this is raised are just Send Warning, Send Warning, Send  
15 Warning.

16 So given after all of these offenses, you would think  
17 you would get something more than a severe warning.

18 Q. So what does this document tell you, if anything, about  
19 the design and the implementation of Cox's system to address  
20 copyright infringement on its network?

21 A. It reaffirms my assessment right at the beginning that  
22 what Cox has is a system that kind of looks like it's doing  
23 something appropriate, but when you take a look at the end  
24 result, it accomplishes nothing. And that's my summary.

25 MR. ALLAN: Very good. Nothing further, Your Honor.

1 THE COURT: All right. Thank you, Dr. McGarty,  
2 you're excused with our thanks, sir.

3 Have a good evening.

4 THE WITNESS: Thank you, sir.

5 NOTE: The witness stood down.

6 MR. ALLAN: Your Honor, we have no further witnesses.  
7 If we could confer, just there might be some housekeeping  
8 matters we can -- we may need to deal with.

9 THE COURT: I'm sorry.

10 MR. ALLAN: We have no further witnesses, Your Honor.  
11 So there may be some housekeeping issues we can deal with.

12 THE COURT: All right, let's take 15 minutes and  
13 we'll come back and see where we are.

14 All right, thank you.

15 NOTE: At this point the jury leaves the courtroom;  
16 whereupon the case continues as follows:

17 JURY OUT

18 THE COURT: All right. We'll take a break and let  
19 you do that.

20 I'm also continuing to struggle with the mitigation  
21 instruction. And certainly Dr. McGarty's testimony went to  
22 that, but I had already been concerned about how Cox could  
23 prove that BMG, through not forwarding -- not taking the  
24 settlement clause out of the notices, what calculation there  
25 could be as to how the jury could reduce any award that it



1 believed was appropriate under the statutory damage regime.

2 And, of course, Dr. McGarty's testimony is, I think,  
3 right on point to what I've struggled with, is, you know, the  
4 notices weren't going through regardless of whether they were  
5 blacklisted or not. And if the settlement clause had been  
6 removed, then only a small number of notices would have gotten  
7 through.

8 So I'll give you a chance to talk about and then I  
9 would like to hear your comments when we come back. So let's  
10 take 15 minutes, we'll come back at 10 of 5, and we'll probably  
11 not do closing instructions to the jury tonight. That would  
12 mean we would keep them -- well, let's see how we go when I  
13 come back. So we're going to take 15 minutes.

14 We're in recess.

15 NOTE: At this point a recess is taken; at the  
16 conclusion of which the case continues in the absence of the  
17 jury as follows:

18 JURY OUT

19 THE COURT: Okay. Do we have -- is BMG done with its  
20 rebuttal case, and do you have additional matters to discuss  
21 or --

22 MR. KELLEY: We've got, I think it's housekeeping on  
23 both sides.

24 THE COURT: Okay. Well, let's --

25 MR. KELLEY: We've got exhibits. They want to

1 introduce exhibits; we want to introduce. I just want to make  
2 sure it didn't get lost in the stampede to close.

3 THE COURT: Okay. Well, it looks like to me we're  
4 going to spend the next half an hour talking about jury  
5 instructions because I want to hear any further comments you  
6 want to make on mitigation, and then I've got to get a final  
7 package to you, then I've got to give you 10 or 15 minutes to  
8 look at it, and then I've got to give you time to make your  
9 objections.

10 So why don't you -- you know, there's no reason to  
11 keep the jury around, and then I won't get the instructions  
12 started until 5:30, and they'll take a half an hour or so. So  
13 let's let the jury go now if the evidence is concluded and tell  
14 them we'll do the instructions and the closing tomorrow.

15 Does that work for everybody? Is there any reason  
16 that we need the jury to hear anything else?

17 (No response.)

18 THE COURT: Okay. Then, Joe, let's get our jury out  
19 here, and let me let them go.

20 MR. BRIDGES: Your Honor, while they're coming in,  
21 when would you want us to make our JMOL?

22 THE COURT: Yeah, I'll let you do that tonight as  
23 well.

24 MR. BRIDGES: Okay. Thank you.

25 JURY IN

1 THE COURT: All right. Please be seated.

2 All right. That concludes the evidence in the case,  
3 so I'm going to let you go now. We've got some -- we'll be  
4 here for another 40 minutes talking about different legal  
5 issues, and I don't -- I think I might have said that I would  
6 try and give you the instructions tonight, but I don't want to  
7 keep you late to do that.

8 So tomorrow morning, you'll hear my instructions to  
9 you on the law, and then the parties will make their closing  
10 arguments, and then we'll get the evidence back to you, and as  
11 we talked a couple of weeks ago, you'll select a foreperson and  
12 begin to deliberate. So I expect that you'll have the case for  
13 deliberations, you know, tomorrow lunchtime or there around,  
14 okay?

15 So again, it's very important that you go home and  
16 enjoy the evening, not discuss the testimony with anyone, and  
17 also not do any research or investigation, all right? Thank  
18 you so much. You're excused for the evening.

19 JURY OUT

20 THE COURT: All right. Have a seat.

21 Before I forget, we need -- you need to decide  
22 whether you want to allow the additional alternate jurors to  
23 deliberate, and if both parties agree, I'm happy to let them  
24 deliberate. I'm sure they would like to deliberate, but if  
25 either side objects, then we'll go down to the original six who

1 are still with us. Well, we'll see what happens tomorrow  
2 morning, but right now they're with us. So you can talk about  
3 that.

4 So how -- do you want to do the -- let's do the  
5 mitigation first. Mr. Theodore?

6 MR. THEODORE: So, Your Honor, I think we've heard  
7 un rebutted testimony that at least for the vast majority of  
8 notices, when they go into -- when they're sent to Cox, nothing  
9 happens, and for Rightscorp notices, because of the volume of  
10 them and the 200 hard limit, that number is going to be even  
11 higher.

12 So based on that, there's no factual basis for a  
13 mitigation instruction here, and on top of that, on top of  
14 that, there's no calculation and there's no basis for  
15 calculating the amount of what mitigation might be.

16 Now, what's being mitigated is the portion of  
17 statutory damages that relates to actual damages. Now, we have  
18 heard a calculation of actual damages, and we had our  
19 objections to it, and it went into evidence, but there's been  
20 no, no suggestion whatsoever as to the calculation of  
21 mitigation.

22 Third, and this goes to the -- sort of the essence of  
23 mitigation itself, is that Cox, not BMG, is in the best  
24 position to deal with the settlement language in the notices.  
25 Cox could have removed the settlement language if it wanted to,

1 but not only that, we didn't just send settlement -- copyright  
2 infringement notices containing settlement language. There is  
3 also the weekly roll ups. There's also the Dashboard.

4 Cox had this information in all sorts of ways, not  
5 including the settlement language. It was there. It was there  
6 in a machine-readable way that they could have looked at, and  
7 they were the ones who chose to do nothing with it. We  
8 provided the information to them without the settlement  
9 language, and they chose to do nothing. So for them then to  
10 come back and say, oh, we failed to mitigate our damages by  
11 taking out the settlement language, I just don't think that  
12 there's a factual basis for that.

13 And finally, even if mitigation is properly in this  
14 case, it's not properly in as a stand-alone defense jury  
15 instruction. It's at most one little piece of the actual  
16 damages factor in the statutory damage instruction. It's  
17 completely disproportionate to its significance and its role in  
18 the case to pull it out into its own giant instruction that  
19 improperly magnifies and emphasizes it for the jury far beyond  
20 what's justified by the evidence.

21 THE COURT: Okay. Thank you.

22 MR. WAKEFIELD: Your Honor, there are two paths that  
23 the evidence has shown were available to BMG and Rightscorp to  
24 mitigate this damage, and instead of following those paths,  
25 they sat there for three years and let a machine send literally

1 tens of millions of e-mails, knowing they weren't being  
2 received.

3           The testimony that I think gave the Court some pause  
4 today from Dr. McGarty was a suggestion that, well, if they had  
5 gone through, upwards of 88.9 percent of them would have gone  
6 nowhere. That is not what the data showed that Mr. McGarty  
7 reviewed. What he did is he combined other blacklisted people.

8           If Rightscorp had fixed its notices and sent them  
9 along, they wouldn't have been in that new column of  
10 4.6 million notices that give him the 90 percent. The evidence  
11 shows that when people went into the CATS system, which  
12 Rightscorp would have been able to do had they cured the  
13 defects in their notices, the system did work. There's  
14 evidence, and they'll -- obviously, we're going to fight about  
15 it in closing arguments, and the jury may fight about it back  
16 when they're deliberating, but the evidence showed that within  
17 receiving five notices, 96 percent of the time, the accounts  
18 stopped receiving complaints because people would say, oh,  
19 there's a problem on my system, I'm going to stop this, or I'm  
20 going to stop my kid, or I'm going to secure my WiFi, and they  
21 knew they could be seen with what they were doing. It makes  
22 sense that they would stop. That system was available to them,  
23 and there's, you know, competing evidence to argue, but there's  
24 definitely evidence to support that instruction.

25           The other path that was available, and the evidence

1 shows this, is that Rightscorp knew about and did, in fact, use  
2 subpoenas and John Doe lawsuits to go after the egregious  
3 people and could have done that here but didn't.

4 And more generally, Mr. Hubert testified he never  
5 picked up the phone. He never reached out. He never contacted  
6 us at all. It was all outsourced to Rightscorp to just send  
7 notices, and I think given that, the jury could find that there  
8 was a failure to mitigate, and failure to mitigate, for the  
9 reasons we put in our jury instructions briefing, can be a  
10 stand-alone defense to statutory damages, not just a factor,  
11 and one that can eliminate the recovery of damages in  
12 appropriate cases. So that's why it needs to be, in our view,  
13 a stand-alone defense.

14 THE COURT: Okay. Thank you.

15 MR. THEODORE: So let's say that all the Rightscorp  
16 notices had gone into the system. 200 a day times 365 days  
17 times 3 years, that's about 200,000 notices. That's about 1  
18 percent. At maximum, 1 percent of the Rightscorp notices would  
19 have been acted on under their system, completely ignoring the  
20 settlement offers.

21 So the suggestion that if we just removed the  
22 settlement offers, that something would have happened, there's  
23 no factual basis. Their interrogatory responses, and just the  
24 part of the interrogatory response relating to the 200 hard  
25 limit, shows that there is no basis for a mitigation

1 instruction.

2 Now, Mr. Wakefield referred to the 96 percent, and I  
3 think we've had a fair amount of discussion on it, but I think  
4 for this purpose, it's pretty clear that the 96 percent doesn't  
5 show what they're claiming the 96 percent does. The 96 percent  
6 is just sort of the rolling average of how many people get to  
7 what level of the graduated response within six months, but  
8 when you're cutting out 90 percent of the notices and you're  
9 cutting off -- and you're dropping off all infringements at the  
10 back of the six months, the fact that people, that 96 percent  
11 only get to level 5 doesn't really show you what's happening in  
12 terms of how much they're infringing. It's not actual evidence  
13 of how effective their system is.

14 And I think finally, the critical thing here is that  
15 it's not appropriate for Cox to construct a scheme to ignore  
16 notices and then turn around and say, oh, unless you play by  
17 the rules of our scheme and give up your right to ask for  
18 settlements, that you haven't mitigated your damages. I mean,  
19 that turns things fundamentally upside down.

20 THE COURT: Well, during the break, I actually was --  
21 I did the math that you just did here, and it is -- actually, I  
22 thought it was -- it's far less than 1 percent, but it is a  
23 calculate-able, quantitative amount that the jury could  
24 consider. There's also the testimony about how Cox worked with  
25 customers and if they wanted -- you know, pled for more than



1 200, there's some evidence that they would be allowed to get  
2 400 notices through, and I think that testimony got in. There  
3 was the RIAA testimony where there was negotiations. I didn't  
4 see any final number, but there were negotiations.

5 So what are you going to say now?

6 MR. THEODORE: Well, I understand that. I understand  
7 where you're coming from on that, Your Honor, but I don't think  
8 it changes the fundamental point that, one, the vast  
9 majority -- I mean, the vast majority of what they're talking  
10 about still would have been ignored. The effect that they are  
11 going to claim for mitigation, the effect that they are  
12 claiming for mitigation essentially would not have occurred.  
13 You can pull out some teeny little pinprick amount, but the  
14 effect they're asking for isn't a real effect in this case.

15 THE COURT: Well, that's argument to the jury.  
16 That's for the jury to decide what they wish to do. I'm going  
17 to give a stripped-down Ninth Circuit instruction on the  
18 mitigation, just the elements and the burden, and then the  
19 reason that a separate instruction is necessary is it's the  
20 only affirmative defense that Cox has, so -- sit down.

21 So I think that it's appropriate to identify the fact  
22 that it is an affirmative defense and that they have the  
23 burden, and that doesn't come through if all you're doing is  
24 adding it as one of the factors for statutory damages, which I  
25 also have done, all right?

1           So your exception is noted, but -- so housekeeping  
2 matters, let's talk about those.

3           MR. REILLY: Your Honor, I have a very simple one, if  
4 I may.

5           THE COURT: Yes, sir.

6           MR. REILLY: The parties noted that we had either  
7 misstated or it had been mis-transcribed two of the exhibit  
8 numbers that the parties agree have been admitted based on your  
9 rulings, and I talked with Mr. Linnell, and he thought the best  
10 way to correct this would simply be to read it into the record.

11          THE COURT: That's fine.

12          MR. REILLY: And hopefully Ms. Thomson will  
13 accommodate us.

14                 At page 1414, line 6, an exhibit was recorded as  
15 DTX 0113, but the parties agree it should be DTX 0133, which  
16 you had admitted.

17          THE COURT: Okay.

18          MR. REILLY: And at page 776, at lines 6 through 12,  
19 an exhibit was identified as -- sorry, this is PX 2389, and the  
20 parties agree it was admitted as and should be referred to as  
21 2839.

22                 And I'll further report it took six lawyers, three  
23 paralegals, all the king's horses and all the king's men to  
24 find two transcription errors in 2,000 pages of trial exhibits.

25          THE COURT: That's not bad.

1 MR. REILLY: So your staff is doing a great job.

2 THE COURT: Thank you.

3 MR. REILLY: Thank you, Your Honor.

4 THE COURT: Ms. Jobson.

5 MS. JOBSON: Good afternoon, Your Honor. The  
6 defendant had provided last week some proposed  
7 self-authenticating documents to the Court. I have an updated  
8 binder because through the course of some negotiations with  
9 counsel, we've adjusted things.

10 THE COURT: Are there still objections to some of  
11 these?

12 MS. JOBSON: Yes.

13 THE COURT: Okay. So I need to see them. Thank you.  
14 All right.

15 MS. JOBSON: And I thought it might make sense, Your  
16 Honor, to start actually towards the back. There's a group of  
17 documents that we may be able to treat together, starting with  
18 DTX SC0068. I think in your binder, the documents are all in  
19 blue.

20 THE COURT: Okay.

21 MS. JOBSON: These are printouts of source code that  
22 we'd like to move into the record. I believe plaintiffs would  
23 want it to be under seal, which we are amenable to. These are  
24 modules --

25 THE COURT: Rightscorp?

1 MS. JOBSON: Rightscorp's source code, yes.

2 The first one, 0068, is the test5 module, the  
3 Infringement Finder that Ms. Frederiksen-Cross discussed,  
4 Mr. Boswell discussed, Mr. Steele discussed, and Mr. Rucinski  
5 discussed, and I believe Mr. Bardwell relied on this, the  
6 output from this module for his analysis.

7 THE COURT: What's the objection to this one?

8 MR. KELLEY: Your Honor, it's basically a foreign  
9 language. You know, in fact, you heard Mr. McGarty say not  
10 even he speaks Java. And so what you've got is, is you don't  
11 have any witness who's sat down and gone through it and said,  
12 okay, here's how it runs, and look at this and look at this.  
13 It's just throwing stuff in that nobody understands.

14 THE COURT: Is this for the appellate record, or what  
15 use are you going to make of this? Why is it relevant, I  
16 guess? I mean, it has been testified about, and, you know, it  
17 would have been authenticated if BMG's witness had been asked  
18 about whether this was, in fact, what she reviewed, and so I  
19 get that part, but where -- what's -- why?

20 MS. JOBSON: So there's a couple specific things. On  
21 the next module, which is SC0230, this one represents the 10  
22 percent code, the 10 percent bitfield, and the jury may be able  
23 to see right in the middle where that 10 percent is  
24 implemented. Actually, about two-thirds of the way down.

25 And then in the following module, DTX SC0272, which

1 is the experimental code from 2013, which describes Boswell  
2 experimenting with the different messages from BitTorrent,  
3 you'll see at the very bottom some of those messages, including  
4 "KEEP\_ALIVE," and then on the next page, the  
5 "PeerProtocol.INTERESTED," the "PeerProtocol.NOT INTERESTED,"  
6 the "PeerProtocol.HAVE," and the "PeerProtocol.BITFIELD."

7           These were all things that Ms. Barbara  
8 Frederiksen-Cross alluded to in her deposition -- or in her  
9 trial testimony and that Mr. Rucinski also discussed in his  
10 testimony, and it may be useful for the jury to peruse through  
11 this code to see what they can see from it.

12           THE COURT: Well, is Cox in its closing argument  
13 going to comment on what this information means and how it  
14 should be considered by the jury?

15           MR. BUCKLEY: Your Honor, could I propose a  
16 compromise? The short answer to that is we might. Test2.java  
17 and the two files that implement the bitfield, the language in  
18 those documents has implications that we might argue from. I  
19 think that's less true of test5. The jury heard a lot about  
20 it, and we've got some folks with some IT capability who I  
21 suppose might want to look at it. I don't think test5 is as  
22 important, but test2 and the two 10 percent files matter.

23           THE COURT: Yeah, but the point is that although  
24 they're authenticated in respect to the fact that they  
25 represent code, there was no testimony surrounding it.

1 MR. BUCKLEY: There was significant testimony,  
2 actually. Both Ms. Frederiksen-Cross and Mr. Rucinski  
3 testified about test2, and a number of witnesses, including the  
4 Rightscorp folks, testified about the two files, the 10 percent  
5 bitfield files.

6 THE COURT: All right. What's BMG's response to  
7 that?

8 MR. KELLEY: There was general testimony about what  
9 the code does, but nobody sat there and, you know, in essence,  
10 put the code on the screen and said, okay, here's how it works,  
11 and go through it line by line. In essence, what they want to  
12 do is they want to stick it up there and then say, you know,  
13 they say 2013 functions the same way as 2015. Well, look at  
14 it. It doesn't look the same.

15 THE COURT: Yeah. All right. I'm not going to let  
16 those exhibits in. Your exception is noted. The testimony  
17 will be the testimony that we heard, and, you know, the 10  
18 percent issue has been -- there's been testimony about that  
19 from several witnesses. So this is utterly confusing, No. 1,  
20 and also, as Mr. Kelley said, nobody has identified where in  
21 here they -- any expert was relying with any specificity, and,  
22 therefore, just pointing to different areas in the document  
23 without them having been sponsored in some more particular  
24 fashion is improper. So I'm going to exclude those. Exception  
25 is noted.

1           What's the next one?

2           MS. JOBSON: Okay. We go to, move to DTX 0076. This  
3 is an internal e-mail between Mr. Hauprich at BMG and  
4 Mr. Steele -- sorry, not internal, but between Mr. Hauprich and  
5 BMG.

6           THE COURT: Okay. I'm sorry, DTX --

7           MS. JOBSON: DTX 0076.

8           THE COURT: All right. I didn't hear.

9           MS. JOBSON: Sorry. E-mail between Mr. Hauprich at  
10 BMG and Mr. Steele in the course of their business  
11 relationship.

12          THE COURT: All right. What's the objection?

13          MR. KELLEY: I've got multiple problems with this.  
14 No. 1, I don't see why it's relevant. It doesn't involve any  
15 of the copyrights at issue. It's outside the relevant  
16 timeframe. If you'll note, it's January of 2015, and it's also  
17 got the hearsay in it from some customer calls somebody -- I  
18 guess this Ashley Villone, communicating something, and then  
19 it's passed up the chain. But the main thing is I don't see  
20 what it has to do with anything in the case.

21          THE COURT: All right. I'll let it in. Exception is  
22 noted.

23          Next one.

24          MS. JOBSON: Thank you. I will move to the next one  
25 in the binder, DTX 0077. This one is a 2014 e-mail between

1 Mr. Hauprich at BMG and Mr. Steele in the course of their  
2 business interactions.

3 THE COURT: Hold on. I've got a 78. Are you saying  
4 there's a 77?

5 MS. JOBSON: 77. If it's not in your binder, you're  
6 welcome to have mine.

7 THE COURT: Well, let me look a second time because I  
8 can lose anything and not find lots of stuff.

9 No, I don't have that one.

10 MS. JOBSON: May I pass you mine?

11 THE COURT: Yes, please do. I have an 87, but it's  
12 77.

13 MS. JOBSON: 77.

14 THE COURT: Okay. And I have a 717, but I don't have  
15 a 77.

16 Okay. I'm with you.

17 MS. JOBSON: We'll get to those. So this one again,  
18 Your Honor, is a 2014 e-mail between Mr. Hauprich at BMG and  
19 Mr. Steele in the course of their business relationship.

20 THE COURT: All right. And the reason for the  
21 objection?

22 MR. KELLEY: Again, I don't see what it has to do  
23 with anything, but I also don't see that it hurts. So we  
24 withdraw our objection to this.

25 THE COURT: All right. It's received.



1 MS. JOBSON: Thank you.

2 The next one I have is DTX 078.

3 THE COURT: Okay.

4 MS. JOBSON: Which is a sample settlement receipt  
5 generated as part of the Rightscorp system, which  
6 Ms. Frederiksen-Cross, I understand, talked about the part of  
7 the Rightscorp system that generated these notices -- these  
8 receipts.

9 THE COURT: So this is an example of a customer  
10 responding to the notice and providing --

11 MS. JOBSON: I think the top of the document provides  
12 useful: the Liability Release & Settlement Receipt generated  
13 by the Rightscorp system. You'll see in the second paragraph  
14 below the chart, it has, "forever discharges Robert Steele."  
15 So we understand this to be a sample exemplar as generated by  
16 the system at issue.

17 THE COURT: Okay. What's the objection?

18 MR. KELLEY: It's not an actual notice. It's just an  
19 exemplar. With that caveat, we have no objection.

20 THE COURT: All right, it's received.

21 MS. JOBSON: The next one I have is DTX 0245.

22 THE COURT: All right, gotcha.

23 MS. JOBSON: This one, you'll see at the top 2013,  
24 "Staff Meeting Notes," and towards the bottom is referenced  
25 "Keith/Legal," which we understand to be Mr. Hauprich, these

1 being notes from a meeting as part of the general.

2 THE COURT: Okay. Objection?

3 MR. KELLEY: Mr. Hauprich, who was here, could have  
4 been asked about this. He wasn't. He testified in his  
5 deposition about it and said he didn't think that this was  
6 correct. I have the excerpts of the deposition, the  
7 representation here about Bruno Mars, and that's who Bruno is.

8 And so you've got multiple levels of hearsay. As  
9 near as I can tell from the deposition, Bruno tells somebody  
10 who manages Bruno, who tells somebody at BMG, and it kind of  
11 works its way into the chain. Mr. Hauprich could have been  
12 asked about this and clarified his doubts as to its veracity in  
13 the notes but was not. Like I said, I have the deposition  
14 testimony here.

15 THE COURT: I think he was asked about it, right,  
16 generally? Was he asked about there were some artists who  
17 didn't want Rightscorp to send notices out? Didn't I remember  
18 some testimony about that, or did I strike that for some --

19 MR. KELLEY: I don't remember that coming in, but  
20 there's been so much. And I definitely don't -- there wasn't  
21 any discussion about this specific document which deals with  
22 Bruno Mars and KOL, who I think to be Kings of Leon.

23 THE COURT: Okay.

24 MS. JOBSON: Your Honor, the point that Mr. Kelley  
25 raises is a similar point as with many of the e-mails from

1 Jason Zabek and within the team, that they are back and forth  
2 and not necessarily reflective, and those, I believe, are  
3 mostly, for the most part in the record.

4 THE COURT: All right. Well, I'm not going to -- I'm  
5 going to exclude this one because there were doubts raised in  
6 the deposition as to the reliability of the information in the  
7 document itself. So that's out.

8 Next one?

9 MS. JOBSON: DTX 0408. This again is an internal  
10 e-mail between Mr. Sabec and Mr. Steele in 2014.

11 THE COURT: Okay. DTX what?

12 MS. JOBSON: My apologies, 0408.

13 THE COURT: Okay. I don't -- well, let me make sure,  
14 because I just found DTX 77.

15 MS. JOBSON: Ah.

16 THE COURT: I don't have that one, so if I could have  
17 your copy to look at for a minute?

18 MS. JOBSON: Certainly.

19 THE COURT: I'm sorry, did you say 408?

20 MS. JOBSON: Yes.

21 THE COURT: I do have it; I apologize. Give that  
22 back to Ms. Jobson. Thank you. I'm worse than Dr. McGarty.

23 All right. Go ahead.

24 MS. JOBSON: So again, Your Honor, this one is an  
25 e-mail between Mr. Sabec and Mr. Steele from 2013 referencing

1 Mr. Cadenhead and the notices at issue in this case.

2 MR. KELLEY: I don't see anything about  
3 Mr. Cadenhead. Am I on the right one?

4 MS. JOBSON: Um-hum, Mr. Cadenhead.

5 MR. KELLEY: Oh, there he is. "Weekly roll-ups were  
6 going to Cadenhead." Our problem with this one is context. I  
7 mean, it would have been okay if they had brought it up with  
8 Mr. Steele, and, in fact, something along these lines was  
9 brought up. I'm not sure what it means or what it says. It's  
10 awfully cryptic and has frowny faces that I don't really quite  
11 understand the import of.

12 THE COURT: I guess it could go to the fact that  
13 Cadenhead was staying on top of the numbers that were --

14 MR. KELLEY: Well, this is between Steele and Sabec,  
15 so this is purely internal Rightscorp thing, and we saw those  
16 letters going to Mr. Cadenhead and Mr. --

17 THE COURT: All right. I'll allow it. It's  
18 received.

19 MS. JOBSON: Thank you, Your Honor. Next I've got  
20 DTX 0687. I'll wait until we've located it.

21 THE COURT: I've got that one.

22 MS. JOBSON: Oh, okay. Great. This one again is an  
23 internal e-mail between individuals at BMG in late 2011  
24 generated in the course of their business and contemplating the  
25 Rightscorp business model. 0687.

1 THE COURT: Okay. Mr. Kelley?

2 MR. KELLEY: Once again, it's a context matter,  
3 although this one is not as bad as the other one. It could  
4 have been brought up with Mr. Hauprich when he was here and  
5 able to testify.

6 THE COURT: Yeah. I mean, "I am intrigued by this.  
7 The only point I made to Gregg . . . is the precedent of a \$10  
8 charge for an infringement. Is this a possible exposure for  
9 us?"

10 Yeah, I'm going to -- I'm not going to admit 687, and  
11 your exception is noted.

12 MS. JOBSON: All right. The next one I have is 0717.

13 MR. BRIDGES: DTX?

14 MS. JOBSON: Yes, it's DTX 0717.

15 THE COURT: All right, I have that.

16 MS. JOBSON: Okay, great. This one again is a 2013  
17 e-mail, internal to BMG. This goes to the state of mind of how  
18 they were planning to enforce copyrights through Rightscorp.

19 If you'll scroll down to -- I guess it's not  
20 scrolling, turning to the second page there, you'll see that  
21 the earlier e-mail in the chain is with Mr. Christopher Sabec.

22 MR. KELLEY: It looks to me like this is a business  
23 deal they were contemplating, not one that was done. You see  
24 up in the top e-mail, "What if we give him everything and  
25 should a client object, they will rescind the notice sent to

1 the user and refund their dollars."

2 My understanding of this is, is that they were  
3 talking about the entire catalog, expanding what they looked  
4 at, as opposed to enforcement of these particular copyrights.

5 THE COURT: So why is this relevant?

6 MS. JOBSON: Your Honor, it goes to their business  
7 dealings with Digital Rightscorp and enforcement of the  
8 copyrights through Digital Rightscorp.

9 THE COURT: Okay. I'm not going to permit the  
10 document. Your exception is noted. You know, this is an  
11 ongoing negotiation, and there was significant testimony about  
12 it, and this could have been raised to clear up what is being  
13 talked about here, but as with the information that is in this  
14 e-mail, it's -- I agree with Mr. Kelley that it looked like  
15 ideas just being bounced back and forth about how to handle the  
16 business end, and so it's more confusing, and it doesn't settle  
17 any issues.

18 So go ahead, next one.

19 MS. JOBSON: The next one I have, Your Honor, is DTX  
20 0947.001, and it goes together with the following document,  
21 .002.

22 MR. KELLEY: I had the wrong number. I have it.

23 MS. JOBSON: Great. Are we all together? Sorry.

24 THE COURT: Yes, I'm there.

25 MS. JOBSON: This one is a 2013 e-mail, and if you

1 look at them together, the two documents, .002 and .001, you'll  
2 see it's BMG forwarding communications to Digital Rightscorp  
3 concerning whether or not -- I believe it's Clearwire was  
4 accepting Rightscorp's notices.

5 THE COURT: Okay. Why is that relevant? Why hasn't  
6 that been ruled on, at least the subject matter of it, already?

7 MS. JOBSON: I believe it was earlier in the case we  
8 brought this to Your Honor's attention, and at the time, we had  
9 not yet opened the door to this type of evidence, and now it  
10 has been opened, and we'd like to move this into evidence on  
11 that basis.

12 THE COURT: Okay. Mr. Kelley?

13 MR. KELLEY: Your Honor, the e-mail attaches an  
14 opinion letter from the Davis Wright Tremaine firm. That's the  
15 .002, and that -- I mean, we've been very careful here about  
16 everybody's opinion letters, but this thing is chockablock full  
17 of legal analysis from somebody who isn't here.

18 THE COURT: Yeah. The import of these two documents  
19 is, the fact that there's a legal opinion from Davis Wright --

20 MS. JOBSON: Your Honor, I would actually want to add  
21 one thing: Not so much the content of the legal opinion, but  
22 the fact that Rightscorp was on notice and understood that  
23 other ISPs were not accepting its notices.

24 THE COURT: Well, all right. And as we -- well, I  
25 let that testimony in, and there was testimony about numbers,

1 but I'm certainly not about to let in an opinion letter from a  
2 third-party law firm from a third-party entity when there has  
3 been no opinion by Cox as to the same issue. So your exception  
4 is noted.

5 MS. JOBSON: Moving on to DTX 3553.SAMPLE.

6 THE COURT: I'm there.

7 MS. JOBSON: This one is a sample from the hard drive  
8 that was produced as part of this litigation. Ms. Barbara  
9 Frederiksen-Cross discussed the samples generally that were  
10 drawn from this hard drive that was produced, as well as  
11 Mr. Bardwell and Mr. Rucinski.

12 THE COURT: And the relevance?

13 MS. JOBSON: Your Honor, this goes to the samples  
14 that were collected and suggested as part of the samples that  
15 Rightscorp took to verify the infringements that it claimed to  
16 have detected on Cox's network.

17 THE COURT: Okay. So get -- give me more reference.

18 MS. JOBSON: So you'll, you'll recall that -- you'll  
19 recall that the Rightscorp software at a certain point after  
20 having generated notices downloaded samples.

21 THE COURT: Right.

22 MS. JOBSON: And this is an example of one of the  
23 samples that was perhaps meant to verify a song, but it's not a  
24 song.

25 THE COURT: It was one of the improper notices,



1 notices that were not actual infringements of copyright  
2 material.

3 MS. JOBSON: It's a sample that was downloaded --

4 THE COURT: Right.

5 MS. JOBSON: -- and produced in discovery.

6 THE COURT: Okay. Mr. Kelley?

7 MR. KELLEY: Again, the issue is the lack of a  
8 sponsor. Ms. Frederiksen-Cross could have been asked about  
9 this and put it in. Instead, what's going to happen is the  
10 jury is going to have in its exhibits a completely unidentified  
11 article about something that happened with the Grateful Dead in  
12 England in 1972. How they're going to make head nor hair of  
13 this, I have no idea.

14 MS. JOBSON: Mr. Rucinski actually testified,  
15 discussed this sample specifically, I believe.

16 THE COURT: Okay. I'll let it in.

17 MS. JOBSON: Okay. And this is -- the next one may  
18 be our -- no, not our last one, I'm sorry. DTX 3559. This is  
19 the privilege log of Ms. Barbara Frederiksen-Cross, and this  
20 one, we believe, goes to the state of mind regarding  
21 Rightscorp's and BMG's knowledge that they had a duty to  
22 preserve the Rightscorp software. As you'll see, the dates  
23 begin back in 2013.

24 MR. KELLEY: It's not the date that the lawyers  
25 generated. That was the date of the document. And I thought,

1 I thought the duty to preserve had already been resolved.

2 MS. JOBSON: And Judge Anderson did rely on this  
3 particular document in his --

4 THE COURT: Yeah, I'm not going to -- your exception  
5 is noted. I'm not going to let this document in. It's just  
6 that there's no -- this has been litigated. Judge Anderson has  
7 made his ruling. I've got a spoliation instruction that says  
8 that documents were not -- that the software system -- that the  
9 source code was overridden, and that as a result, Cox was  
10 unable to test the infringement.

11 So I guess I could identify the dates, but if you --  
12 that's -- the dates are not in the instruction. So if you want  
13 me to add the dates that Judge Anderson actually has in his  
14 opinion, I believe, doesn't he have -- then I'll do that, all  
15 right?

16 MS. JOBSON: Thank you, Your Honor.

17 THE COURT: But I'm not going to let this underlying  
18 document in, okay?

19 MS. JOBSON: Thank you.

20 THE COURT: All right.

21 MS. JOBSON: I've got one more document that I  
22 believe is just sort of a -- we had some confusion about.

23 THE COURT: Okay. It's not in here?

24 MS. JOBSON: No. I have a copy for you right here.  
25 My apologies. We're just cleaning up our exhibit list amongst

1 ourselves.

2 My understanding is that this particular document was  
3 associated with testimony in Mr. Christopher Sabec's videotape  
4 that was played but that the videotape was stopped, and so that  
5 the surrounding testimony didn't come in, but there had been no  
6 objection to the document.

7 THE COURT: Okay. The document is not coming in,  
8 either. My ruling was that I wasn't going to get into the who  
9 published what about what suit and who said, commented to the  
10 news about any, about whether the suit was valid or invalid or  
11 people tried to make, you know, some marketing material out of  
12 it. I find all that's irrelevant, and so your exception is  
13 noted. I'm going to exclude the document as well.

14 MS. JOBSON: Okay. And did you have any additional  
15 documents, or should we move into the self-authenticating  
16 documents? I don't have any documents -- or, sorry, the  
17 judicial admissions.

18 MR. KELLEY: Sorry to tag team in Mr. Allan, but he  
19 has one here that I'm not familiar with.

20 THE COURT: Sure.

21 MS. JOBSON: I don't know that I am, either. Or is  
22 this the one you handed me earlier?

23 MR. KELLEY: No, I'm not sure what he's doing.

24 MR. ALLAN: This is a quick question about one you've  
25 already admitted, Your Honor. DTX 408 was just admitted. This

1 is the one where Mr. Sabec and Mr. Steele are testifying, are  
2 stating in an e-mail, "There is going to be a problem." I  
3 think there is another e-mail that follows up on this that  
4 explains, oh, there's actually not a problem, and if this is  
5 going to come in, Your Honor, we'd like that one to come in as  
6 well from a fairness perspective.

7 We don't have that here. And my memory -- we've seen  
8 a lot of e-mails, so if it pleases the Court, if we could check  
9 on that tonight and, if there is such an e-mail, move it in  
10 tomorrow?

11 THE COURT: Yeah, it sounds like it would be  
12 admissible on that basis, so see if you were dreaming about it  
13 or whether it exists, and we'll consider that in the morning.

14 MR. ALLAN: Sadly, I have dreamt about e-mails in  
15 this case, Your Honor.

16 THE COURT: Yeah.

17 MS. JOBSON: I understand completely.

18 Oh, you have another one?

19 MR. KELLEY: We have two. I'd like to move two  
20 judicial admissions, if that's okay.

21 MS. JOBSON: Sure.

22 MR. KELLEY: This is PX 2170 is the number, and it's  
23 some back-and-forth between Mr. Zabek and Mr. Sikes, and it  
24 deals with the reduction in force. I think the really  
25 pertinent one is at the bottom of the second page, below the

1 redacted for privilege. And it says it was sent on 01 Mars.  
2 For some reason or another, this gets translated into French,  
3 I'm not sure why, but anyway, it has to do with the reduction  
4 in force that has been talked about a lot within the abuse  
5 staff and how they ended up quite shorthanded.

6 MS. JOBSON: Your Honor, this document is dated from  
7 back in March 2011 for one, and counsel had the opportunity to  
8 ask Mr. Sikes and Mr. Zabek about this in their deposition, and  
9 I don't believe they did. It's not marked as a deposition  
10 exhibit, and it lacks context that they could have gotten from  
11 deposition if they were wanting to ask about it then.

12 THE COURT: Well, it is during the period of the  
13 reduction that was testified about, right? Didn't they -- I  
14 think --

15 MR. KELLEY: Your Honor, it's about the reduction  
16 itself.

17 THE COURT: All right. Okay.

18 MS. JOBSON: It isn't relevant to the notices at  
19 issue.

20 THE COURT: No, but it goes to the theory that Cox  
21 was reducing their abuse staff and that maybe that wasn't  
22 such -- that wasn't appropriate. So I'll let the document in.  
23 Your exception is noted.

24 What's the other one?

25 MR. KELLEY: The final one that we have is PX 1837,

1 and again, these are e-mails between Mr. Zabek and the Abuse  
2 Team, and it has to do with the limit on how many they will  
3 accept and then what happens with, you know, the letters and  
4 stuff that they send out.

5 MS. JOBSON: This one again totally lacks context and  
6 was not, as far as I can tell, asked about in deposition of  
7 Mr. Zabek.

8 THE COURT: Well, why wasn't it asked? Why didn't  
9 you use it? Did you just find it or something?

10 MR. KELLEY: I don't know. It's probably an innocent  
11 oversight.

12 THE COURT: Yeah.

13 MR. KELLEY: It addresses things that have been  
14 discussed rather extensively in the course of the trial  
15 testimony.

16 THE COURT: Well, I think it is --

17 MS. JOBSON: From back in 2010.

18 MR. KELLEY: Mr. Allan pointed out that Mr. Cadenhead  
19 did testify rather extensively about 2010.

20 THE COURT: Yeah. All right. I'm going to let it  
21 in. Exception is noted.

22 MS. JOBSON: Should we move on to judicial  
23 admissions?

24 THE COURT: Certainly.

25 MS. JOBSON: I think for many of these, we actually

1 reached agreement, though the first one in my binder -- which I  
2 believe you have binders from Friday?

3 THE COURT: Yes. Okay. I'm with you.

4 MS. JOBSON: So the first tab is from docket No. 652,  
5 plaintiff's reply in support of their motion to exclude  
6 Dr. Sullivan. We've redacted quite a bit, and I believe one of  
7 the issues counsel had with this is that the redactions were  
8 maybe confusing. We had offered to extract the relevant  
9 statements, but I'm not sure that we ever reached agreement on  
10 that one.

11 THE COURT: So where does this come from?

12 MR. KELLEY: This is a brief.

13 MS. JOBSON: This is their reply in support of their  
14 motion to exclude Dr. Sullivan, and there are some relevant  
15 statements about the functioning of the Rightscorp code and  
16 what it does and doesn't do.

17 THE COURT: All right. No, I'm not going to admit an  
18 argument in brief when we've had two weeks of testimony about  
19 this subject, and the jury should be focusing on that  
20 testimony.

21 Are these all reply briefs?

22 MS. JOBSON: No.

23 THE COURT: I mean, all briefs?

24 MS. JOBSON: No, Your Honor.

25 THE COURT: Okay.

1 MS. JOBSON: We have RFAs, RFAs 4, 6, 8, 10, 17, and  
2 20, and I think we're good on that one. There was no  
3 objection.

4 THE COURT: Okay.

5 MS. JOBSON: Same thing with the interrogatory  
6 responses, 5 and 7. I believe we agreed on the -- that these  
7 are fine as redacted.

8 THE COURT: All right.

9 MS. JOBSON: Same thing with interrogatory responses  
10 No. 9 and 19.

11 THE COURT: Okay. Got all those.

12 MS. JOBSON: And then the last document you have is  
13 the complaint, also redacted. The portions we have not  
14 redacted go to plaintiff accusing Cox of having over 200,000  
15 repeat infringers and that it was willfully blind because it  
16 refused to terminate those. However, over the course of time,  
17 most of those allegations have slipped away, and this goes to  
18 the reliability of the Rightscorp software.

19 THE COURT: How does it go to the -- Mr. Kelley, go  
20 ahead.

21 MR. KELLEY: Yeah. First of all, the case has  
22 changed rather dramatically in its scope since it was filed.  
23 We're missing a plaintiff. There have been a whole bunch of  
24 copyrights that haven't been at issue. And I've never seen --  
25 and I've seen a few things -- actually in a judicial admission



1 context introducing stray facts out of a pleading and putting  
2 the pleading in. I mean, if they want to put the entire  
3 complaint in, that might be something we could talk about, but  
4 just cherry-picking a stray fact is not what a judicial  
5 admission is about.

6 And I did a little Fourth Circuit research, and they  
7 talked about a judicial admission being an intentional and  
8 unambiguous waiver that releases the opposing party from its  
9 burden to prove facts necessary to establish the waived  
10 conclusion of law.

11 This seems to be like some kind of impeachment, like,  
12 you didn't get it right initially, lawyers, when you wrote it,  
13 and even though the case is changed, we are going to try to  
14 hang it around your neck.

15 THE COURT: Yeah, that's not -- the redacted  
16 complaint is not -- or amended complaint is not a judicial  
17 admission, so I'll not allow it. Your exception is noted.

18 MS. JOBSON: I don't believe we have anything further  
19 on these two.

20 THE COURT: Okay.

21 MS. JOBSON: Mr. Kelley?

22 MR. KELLEY: I think that's it for us.

23 THE COURT: Okay. All right. Well, it's not fair to  
24 give you five minutes to look at the jury instructions when I  
25 still don't have them prepared, but they'll be prepared in a

1 few minutes, and so would you still prefer me to give the jury  
2 instructions before closing arguments? Is that the way you  
3 would prefer me to do it when we've got -- all right. Yeah.

4 MR. KELLEY: We do.

5 THE COURT: Yeah.

6 MR. KELLEY: It gives us the ability to point things  
7 out to the jury.

8 THE COURT: Okay. Well, I see by nod of heads that  
9 counsel for Cox agrees. So that gives us a little bit of a --  
10 well, maybe it's better. I'll give you an opportunity to argue  
11 them in the morning at 9:00, but likely, they won't be changing  
12 a whole lot at this stage after you've already submitted your  
13 written briefing on the subject, and the fact that I use the  
14 O'Malley instructions, frankly, it's an opportunity for you to  
15 tell me that there's something in there that is wrong.

16 And I -- my theory on jury instructions, just so you  
17 know where I'm coming from, is that I give the framework. I  
18 don't give instructions that in any way direct a jury's  
19 attention to one issue or one element of an analysis, and so  
20 that's why I use O'Malley is I find they're pretty neutral, and  
21 they give latitude for argument, which is where I think that  
22 that should lay. So I don't think there's much in there -- I  
23 mean, there's a lot there -- there's a lot missing from what  
24 you want me to give, but I don't think there's anything in  
25 there that's contrary to law, but I certainly want you to point

1 out to me things like, you know, whether I'm going to, you  
2 know, give a contributory infringement instruction that  
3 includes the non-infringing uses, I'm not, but that's -- I  
4 think you're protected on that, but if you want to make a  
5 record, you know, regarding the *Sony* case and how it applies,  
6 certainly I want the record to be clear.

7 So I think we can do that fairly quickly, and then  
8 hopefully that gives you time to prepare any additional slides  
9 you may want to use in your presentations to the jury. So does  
10 that work?

11 MR. KELLEY: Yeah, I believe so.

12 Roger, is that good with you?

13 MR. WARIN: I think that's fine, Your Honor. Will we  
14 also get the verdict form that you intend to use tonight?

15 THE COURT: Yeah. And we haven't talked about that  
16 at all, and there was a comment on it. I'm going to give the  
17 BMG verdict form. I find that it's clear, that the underlying  
18 issues of infringement and contributory and vicarious  
19 infringement are all included in other instructions, and that  
20 there's no need to go through the special verdict form that Cox  
21 has suggested. So my intent is to give the BMG form, and I may  
22 take that you can't give us any more than \$209 million out as  
23 not necessary, but otherwise, I intend to use it, and again,  
24 I'll give you an opportunity to make formal objections to that  
25 in the morning.

1 MR. WARIN: And what were you planning to do with  
2 respect to the motions? I know --

3 THE COURT: Yeah.

4 MR. WARIN: -- Mr. Bridges has a motion to make, and  
5 we have one as well.

6 THE COURT: Yes, I'll hear those now. So -- hold on.  
7 All right. Mr. Bridges?

8 MR. BRIDGES: Your Honor, I know it's late, so I'll  
9 try to be quick. This case has finally become at the end of  
10 all evidence crystal clear, and if this were a fox hunt, the  
11 plaintiffs have been chasing a squirrel. The Court took the  
12 DMCA out of this case a while back, and plaintiffs have tried  
13 to prove over and over and over just one thing: that Cox  
14 didn't have a good repeat infringer termination policy. That's  
15 what their entire case has been about.

16 And section 512(l) of The Copyright Act says if  
17 there's no safe harbor, that doesn't weigh against a defendant  
18 on the substantive claims.

19 What they have failed to do is actually to pay  
20 attention to the elements of copyright infringement. Let's  
21 start with contributory, at the heart of it. It's in one who  
22 with knowledge of the infringing activity, induces, causes, or  
23 materially contributes. That's the classic formulation, and  
24 the sort of material contribution focus is exactly what the  
25 *Sony* case was about, and *Sony* and other cases have said, and

1     *Grokster* in Justice Ginsberg's concurrence where she discusses  
2     it, says, well, to get there, your product -- you cannot be  
3     liable under that prong if your product or service is capable  
4     of substantial non-infringing use. I know you've heard of this  
5     a number of times.

6             Well, the fact is, it's clearly capable. So they  
7     should have been making a *Grokster* case of intent to get around  
8     the *Sony* substantial non-infringing use limitation.

9             They could have made a *Grokster* case, but they --  
10    they could have tried to do it, but there's no evidence of a  
11    *Grokster* claim, that satisfies a *Grokster* claim, and they  
12    didn't even try. At the summary judgment level, Your Honor,  
13    they said -- they admitted that they had no evidence of intent.  
14    That standard under *Grokster* is intentional inducement through  
15    clear expression or other affirmative steps taken to foster  
16    infringement.

17            There's none of that here. So with a  
18    non-infringing -- with a service with substantial  
19    non-infringing use, their failure to make the intent case  
20    causes a complete failure of proof on contributory.

21            Now, let's move to vicarious. The question is, is an  
22    ordinary ISP relationship the kind of relationship that  
23    supports vicarious liability? The answer is no.

24            Mr. Pecau spoke wrongly the other day when he said  
25    that after *Gershwin*, it's not about relationships. Vicarious

1 is about relationships, and the two elements of vicarious  
2 points to the types of relationships for which vicarious  
3 liability is appropriate.

4 And the Fourth Circuit standard is the correct  
5 standard, and the standard in *Nelson-Salabes* comes straight  
6 from *Shapiro-Bernstein* in the Second Circuit, which is a  
7 seminal one. It is when an obvious and direct financial  
8 interest, obvious and direct financial interest, is coupled  
9 with a right and ability to supervise the infringing activity.  
10 Those are the elements.

11 Now, Mr. Nowlis gave a terribly flawed survey trying  
12 to address some esoteric issue of draw, but what he was talking  
13 about is certainly not an obvious and direct financial  
14 interest. They like to use Ninth Circuit language that isn't  
15 about interest, it's about benefit, and there's a big  
16 difference between a financial interest in something and a  
17 financial benefit from something.

18 When I fly here on Delta Airlines, I have a real  
19 financial benefit from Delta Airlines, because I make money by  
20 flying places and doing work, but I don't have a financial  
21 interest in Delta Airlines. This is an important difference,  
22 and the Fourth Circuit standard is financial interest, direct  
23 financial interest in *CoStar*, obvious and direct financial  
24 interest in the leading case of the Fourth Circuit,  
25 *Nelson-Salabes*. So they don't meet that standard.

1           It's vicarious. And the Fourth Circuit is not about  
2 control. It's not about the ability to terminate doing  
3 business with someone. Otherwise, every business relationship  
4 would be a vicarious liability relationship, because you have a  
5 benefit from being in a relationship to somebody and you can  
6 always supervise them by terminating the relationship.

7           So it doesn't -- this doesn't fly under vicarious,  
8 either.

9           On direct, a couple of details. Testimony came out  
10 about -- let's go back to the whole making available thing, and  
11 we appreciate the ruling on making available. It turns out  
12 that Rightscorp did not even detect whether the peer computers  
13 at the other end were offering the files. Their --  
14 Mr. Rucinski talked about, I think, an unchoke signal, and  
15 Rightscorp didn't even look for that signal, and that's how  
16 BitTorrent clients say, we have it to offer. Rightscorp didn't  
17 even look for it.

18           And so their reliance on circumstantial evidence,  
19 because, well, there must have been transmissions, they weren't  
20 even looking for real sharing.

21           In the summary judgment opinion, the Court expressed  
22 the view that BMG had not authorized Rightscorp to initiate  
23 transmissions. Well, we've gotten testimony from Mr. Hauprich,  
24 I believe, that, in fact, BMG had authorized Rightscorp to  
25 collect evidence of infringement. The way it was doing it was

1 by initiating transmissions.

2           There is no distribution by any standard to the  
3 public by any type of transaction. So they are really locked  
4 out on Section 106(3). That leaves the only remaining  
5 underlying infringement that could sustain this case as  
6 violations of the reproduction right by Cox subscribers. The  
7 problem is, Your Honor, that possession at some point connected  
8 to the network doesn't tell us how they got it. So they can't  
9 establish and Rightscorp admitted it can't observe downloads.  
10 It doesn't know when downloads occur. So there is nothing to  
11 connect the dots. So their fall-back on all of this, Your  
12 Honor, is, well, circumstantial evidence.

13           Well, Your Honor, they did get the names and  
14 addresses and contact information of 122 people. They said  
15 early on that they weren't really planning to use them, and I  
16 think it's wrong to suggest that somebody with access to real  
17 information says, well, we won't use that information because  
18 we'll just sit back and say, must have happened.

19           Your Honor, that's not an appropriate use of  
20 circumstantial evidence here. So they haven't met the  
21 contributory standard under Supreme Court and Fourth Circuit  
22 law. They haven't met the vicarious standard under Fourth  
23 Circuit law. They haven't met 106(3). They haven't met  
24 106(1). We think this case -- this isn't just a pro forma  
25 motion, Your Honor. We think this case is absolutely suited



1 for judgment as a matter of law in Cox's favor. Thank you.

2 THE COURT: Thank you.

3 MR. PECAU: Your Honor, I'll be very quick. We've  
4 gone over this many times in the summary judgment arguments,  
5 and again, they're arguing that this is a *Sony* case or a  
6 *Grokster* case. It isn't, as Your Honor had found. Unlike  
7 those cases, Cox has had specific evidence of specific  
8 infringements on its networks. It's gotten millions of  
9 notices. Completely different type of case.

10 So, Your Honor, I'm just going to quickly go through  
11 contributory infringement and vicarious liability, and I'm not  
12 going to spend much time on it. Okay. First of all --

13 THE COURT: Spend whatever time you think you need  
14 to.

15 MR. PECAU: All right. Well, Your Honor, first of  
16 all, in terms of contributory infringement, as Your Honor  
17 knows, there are two elements to it. The first is knowledge.  
18 And, Your Honor, we have the notices which satisfy everything  
19 that's in the DMCA, satisfy everything Cox relied upon, that  
20 were done under penalty of perjury, that not only had the IP  
21 address, the port number, the title of the song, and the hash  
22 value. All these things gave Cox notice.

23 Now, you know it's the same thing if I get a  
24 notice -- I think somebody talked about the IRS. The IRS sends  
25 me a notice, puts it in my hand, and I just let it drop. You

1 have notice under the law.

2 In addition to that, Your Honor, it's willful  
3 blindness. All of what Cox has done, as the evidence has  
4 shown, is, is concocting a system that is designed so that they  
5 don't have to deal with infringement. And, you know, they do  
6 it, as Mr. McGarty -- Dr. McGarty testified, it's a very well  
7 thought out, very sophisticated system to pretend to do  
8 something but, in fact, do nothing.

9 And Dr. McGarty went through all the steps that they  
10 do, so that you have millions of infringement, and over a  
11 two-year period, you have, you know, half a dozen, I mean, some  
12 incredibly low number, and I believe the evidence also  
13 indicates that there are other reasons why Cox might have,  
14 might have terminated those people. So clearly knowledge, Your  
15 Honor.

16 Then the question is, you know, is there a material  
17 contribution. Your Honor, I think the evidence is overwhelming  
18 that Cox provides the site and facilities that allow these  
19 repeat infringers to access, access these BitTorrent sites so  
20 they can repeatedly infringe. Under *Fonovisa*, *Napster*, all of  
21 these cases, that gives them material contribution.

22 And in addition to that, we have actual evidence that  
23 Cox knew of repeat infringers, that people that they call  
24 habitual users, and even if somebody who infringes 29 times is  
25 caught 29 times, that's not a habitual user. They have found

1 habitual users, and what does Cox do? It pretends to terminate  
2 them and lets them go or doesn't terminate them at all. That  
3 is a material contribution to actual infringement.

4 Okay. Let's talk about vicarious liability. Yes,  
5 Your Honor, there is a relationship that is involved, but what  
6 the law has evolved to, and it evolved back in the 1960s and  
7 certainly was confirmed in *Gershwin* and every single case that  
8 has looked at it since, that it isn't a matter of parent-child  
9 or an agent and principal. What it is is that you have to have  
10 the right to control, and here there couldn't be stronger  
11 evidence of the right to control.

12 Not only do you have the AUP policy that is a  
13 contract which Cox says that if you don't -- if you are  
14 infringing, we have the right to terminate you. In fact, if  
15 you plan on infringing, you shouldn't even sign up. And in  
16 fact, their whole false CATS system is based on that premise.

17 And Mr. Vredenburg testified, well, you know, yeah, I  
18 can control them, I could suspend them by pushing this button.  
19 Well, they don't push the button that often, but they certainly  
20 have the right to do it, and looking at those tickets, when  
21 these things come up, that they're supervising what's going on  
22 in their network, they know that all this infringement is going  
23 on. And this isn't just general knowledge like in *Sony* and  
24 *Grokster*. These are specific instances that they recognize are  
25 copyright offenses.

1           And the thing is is that the whole nature of this  
2 thing and how you find not just Rightscorp, but everybody else,  
3 how they find infringement, as brought out in Mr. McGarty's  
4 testimony, I think on his cross-examination, this is  
5 electronically done. You have the BitTorrent sites, thus, the  
6 way these BitTorrent sites actually work, that they have to  
7 have unique fingerprints so that the BitTorrent can go  
8 together, but what that means is because of those unique  
9 fingerprints, that means that you can actually identify it.  
10 That's why the certainty in addition to all the things that  
11 are, that are required in these notices, the certainty that  
12 there is infringement is at an extremely high level.

13           So let's go to -- so they have the ability to  
14 control. They have the right to control. Let's talk about the  
15 obvious and direct financial interest, and that really comes  
16 in -- I think the strongest evidence is in two parts. The  
17 first part is Dr. Nowlis, whose survey is totally  
18 uncontroverted. Cox could have done their own survey. They  
19 could -- and they could have, they could have tried to show  
20 that, in fact, you know, a sizable portion, one out of ten of  
21 their customers found that being able to download or upload  
22 free digital music through sites such as ThePirateBay,  
23 KickassTorrents, and Torrentz, etc., was a reason that they  
24 subscribed to Cox. That shows draw.

25           And as Mr. Negretti so eloquently testified, that

1 benefits, people are driven to pay more for their service, pay  
2 more for speed to get certain benefits, and the benefit that  
3 they're getting is all this free music out there on BitTorrent,  
4 and people recognize that this is, this is a great opportunity  
5 for you. This enhances the value of Cox, and Cox recognized  
6 it. Its own research shows that there's a lot of peer-to-peer  
7 activity, and if you look at their ads, every single ad that  
8 talked about any activity talked about downloading music.

9 Well, Cox isn't stupid enough to say, well, you know,  
10 you can download illegal music, but when you see what they're  
11 actually advertising, that you can download 100 songs from  
12 iTunes in three seconds -- I mean, they didn't say that. You  
13 can download 100 songs in three seconds, I think the  
14 implication is clear where you can get 100 songs or where  
15 somebody would want to download 100 songs in three seconds. I  
16 mean, that's \$129 in three seconds if you actually went through  
17 someplace like iTunes.

18 I think the clear hidden message is that you can go  
19 to BitTorrent or another peer-to-peer site with your friends  
20 and you can download a ton of music.

21 And if there's any doubt about that, they also in  
22 their Gigablast -- when they're talking about speed on their  
23 Web site, even today they're talking about sharing, Your Honor,  
24 and I think it's pretty clear what sharing they're talking  
25 about. What they're selling is a fiberoptic cable going into a

1 person's home, and what they're saying is that we're giving you  
2 enough speed so that somebody in your home can be sharing,  
3 sharing music -- and they have the file with the music symbol  
4 on it -- can be sharing music, and you can be doing whatever  
5 you want to do.

6 Now, what you might want to do is that if you're in  
7 that kind of household, you might be downloading music through  
8 BitTorrent yourself, or you might be using Netflix, but clearly  
9 the implication is that a household can have someone in there  
10 sharing music and that is an enhanced value. That's a benefit  
11 that you can get.

12 That is a direct financial interest. The case law  
13 couldn't be clearer that that is the kind of interest that is a  
14 direct value.

15 Now, in addition to that, Your Honor, not only do we  
16 have Dr. Nowlis's survey, we have Cox's own advertisements that  
17 they're using to draw people in because they can download  
18 music, what we have is the internal e-mails in Cox, and what do  
19 those internal e-mails say? Not one, not two, but many of  
20 them, they say, we're not going to get rid of these known  
21 infringers because these folks are giving us a financial  
22 benefit. We're getting, what, \$280 or 400 bucks from these  
23 folks, and we're not going to get rid of them because we are  
24 getting a financial interest.

25 Your Honor, we don't have to connect the dots. Cox

1     itself, its internal people, the people who are responsible for  
2     enforcing copyright infringement on the Cox network, they  
3     connect the dots for us. They show what that direct financial  
4     interest is.

5             Okay. The last thing that Mr. Bridges talked about,  
6     you know, is this idea that there's no evidence of direct  
7     infringement. Your Honor, we've spoken about this when we made  
8     our own motion for a directed verdict, but I'll be just quick  
9     about it. So what is the evidence that there's actual  
10    uploading and downloading here?

11            Well, first of all, uploading and downloading, the  
12    cases are clear in *Napster*, I think *Aimster* in the Seventh  
13    Circuit, that if you're uploading and downloading, you're doing  
14    two things. You are copying in violation of a copyright  
15    owner's rights, and you're distributing music in violation of a  
16    copyright owner's rights.

17            And, Your Honor, I think that the evidence couldn't  
18    be clearer that there's a lot of uploading and downloading  
19    specifically identified by Rightscorp using the fingerprint,  
20    the hash values that show infringement.

21            Now, also the fact that these hash values have  
22    common -- are the same hash values for multiple Cox  
23    subscribers, that shows that they're uploading and downloading  
24    the same thing. And as Your Honor has pointed out in your  
25    memorandum on motion for summary judgment, the way BitTorrent

1 works is that as soon as you, as soon as you get on that system  
2 and you, and you start getting the music you're stealing,  
3 you're starting to pump out that music to other people, those  
4 files to other people, that's uploading and downloading.

5 So I think the evidence couldn't be clearer what was  
6 going on and that, and that Rightscorp through all the  
7 testimony in here had actually found that.

8 Now, we've spent a lot of time talking about making  
9 available, and, Your Honor, you know, because the  
10 circumstantial evidence is such surrounding what's going on,  
11 you know, it's really sort of a red herring. I mean, as  
12 *Londonshire* showed and I think the *Howell* case discussed, that,  
13 yeah, if you put in evidence that, you know -- for example, if  
14 I go to a church, right, and I put my -- if I have a bunch of  
15 notices I put down and I don't see anybody taking it, I've made  
16 that thing available for distribution.

17 That's what's *Hotaling* was talking about, even in the  
18 narrow reading of *Hotaling* and *Londonshire* and *Howell*, and what  
19 *Londonshire* and *Howell* said when they're discussing *Hotaling* is  
20 what the Fourth Circuit was really saying was if you do  
21 everything up to the point of making available, you put your  
22 file publicly for people to steal from, the circumstances  
23 around that, a jury can find that there was actual  
24 distribution.

25 And the circumstances in *Londonshire* and *Howell*,



1 which dealt with this kind of case, was that the nature of  
2 BitTorrent, what happens with BitTorrent, what are all the  
3 circumstances that are surrounding it, and, Your Honor, I think  
4 there's so much evidence in this case that a jury could find  
5 that once they detected that available for uploading and  
6 downloading, that actual distribution was the likely thing to  
7 have occurred.

8 In addition, Your Honor, there's plenty of evidence  
9 that Barbara Frederiksen-Cross talked about and the Rightscorp  
10 people talked about that not only did Rightscorp detect what  
11 was going on through these, through these hash values, but it,  
12 in fact, once it -- in I think it was 150,000 cases, once it  
13 detected what was going on with respect to the works at issue,  
14 it actually downloaded those files, which confirmed that there  
15 was actual infringement by users of the Cox system.

16 And, Your Honor, so if you, if you see all the  
17 elements, both in terms of the evidence that there was actual  
18 infringement by users of the Cox Internet service, if you look  
19 at each one of the elements of contributory infringement and  
20 vicarious liability, Your Honor, there's more than enough  
21 evidence for the jury to decide whether there is infringement  
22 in this case.

23 Thank you, Your Honor.

24 THE COURT: All right. Thank you, Mr. Pecau.

25 Mr. Bridges?

1 MR. BRIDGES: Your Honor, I think I discerned,  
2 believe it or not, one point of agreement between counsel, and  
3 that's that this is not a *Grokster* case. It's not a *Grokster*  
4 case. They haven't been arguing the *Grokster* elements at all.  
5 So I think we can confine the debate.

6 They have made their bed in the material contribution  
7 prong of contributory, and they say *Sony* doesn't apply. *Sony*  
8 doesn't apply because, oh, there's lots of knowledge, there's  
9 bad stuff here.

10 *Sony* was a case where the court said it doesn't  
11 matter whether *Sony* has constructive knowledge. Even with  
12 constructive knowledge, it would not be liable.

13 So I'm content. I think the boundaries are clear.  
14 It's not a *Grokster* case. Is it a material contribution case,  
15 and if so, what's the effect of *Sony*?

16 Now, I'm hoping that our time together these couple  
17 of weeks, I hope you've gained a couple of impressions about  
18 our approach under the law. We start with the statutes, with  
19 the language of the statutes. We apply them specifically and  
20 clearly, and then we go to the Supreme Court, and the two  
21 elephants in the room in this case are *Sony* and *Grokster*.

22 And we talk about *Sony* and *Grokster*. They've got to  
23 go one way or the other, or they can try both, but they've got  
24 to meet the standard after *Sony* or they've got to meet the  
25 *Grokster* standard. They're not trying the *Grokster* standard.

1           So, you know, it's the statute, then the Supreme  
2 Court, and then where there's not enough guidance or not  
3 sufficient -- or the Supreme Court hasn't spoken, we go to the  
4 Fourth Circuit, and if the Fourth Circuit hasn't spoken, we go  
5 to other circuits. I'm not citing you to district court cases  
6 because, Your Honor, this is a tough area of the law, and many  
7 facts -- many cases are made in bizarre circumstances with  
8 pretty unsavory defendants.

9           There's a number of default judgment-type rulings out  
10 there, and, and a lot of district courts just sort of grab at  
11 what they can grab, because it's hard and judges don't have  
12 much time, and so the district court cases are all over the  
13 map, and they're citing some district court cases, sure, but  
14 we're going statute, Supreme Court, Fourth Circuit.

15           Under all of those guideposts, they don't make  
16 contributory or vicarious. Their draw they're pulling out from  
17 cases that have bubbled up from the Ninth Circuit, there's no  
18 draw jurisprudence in the Fourth Circuit.

19           And, you know, I don't think I need to go back into  
20 the underlying direct infringement, but they just haven't made  
21 a case because theirs is a statistics case. It's not a reality  
22 case.

23           And, Your Honor, the other thing I think it's  
24 appropriate to insist on is proof and not just must be true  
25 because we've got 1.8 million of something.

1 Thank you, Your Honor.

2 THE COURT: All right. Thank you.

3 MR. PECAU: Your Honor, do you want me to address --  
4 I think we've covered this.

5 THE COURT: No, we're done. I've heard enough  
6 argument. All right.

7 Well, I'm going to deny the JMOL, you know, for the  
8 reasons that I addressed in the summary judgment opinion, but  
9 also as again the evidence has conformed, and I think the jury  
10 has evidence of each one of the prongs necessary to prove  
11 direct, vicarious, and contributory infringement, and, you  
12 know, if the Fourth Circuit or the Supreme Court wants to look  
13 at this under the lens of the Sony case, then there's, you  
14 know, decisions that I've made that are going to be revisited.

15 So let's -- but I, you know, I've made, I've made my  
16 bed. I think I did what I think I was required to do given the  
17 type of case this is, and so certainly your exception is noted,  
18 and the record is preserved.

19 And go ahead, Mr. Allan.

20 MR. ALLAN: Thank you, Your Honor. Obviously, it's  
21 getting late now, it's 6:25, but I would like just on behalf of  
22 BMG to formally bring our Rule 50 motion again as well. We've  
23 submitted it on the papers.

24 THE COURT: You did.

25 MR. ALLAN: And Mr. Pecau very ably stole my thunder

1 with the argument that I would have presented to the Court.  
2 I'm happy to address any of those issues again further, but I  
3 would like to on one particular issue just direct the Court's  
4 attention to the first prong of vicarious in the right and  
5 ability to supervise the infringing activity.

6 I don't think there is any factual dispute on that  
7 issue, Your Honor. I don't think there's any factual dispute  
8 that they have an AUP, which is the contract with the  
9 subscribers, that very clearly gives them the right to shut off  
10 or suspend or take action with respect to copyright  
11 infringement, which is a prohibited activity under that very  
12 contract, the contract that Cox wrote and forces every  
13 subscriber to, in fact, adhere to before they go onto the  
14 network and use the service.

15 And then on the ability side, the CATS system that  
16 Mr. Carothers testified to and Mr. Cadenhead had testified to  
17 and Mr. Vredenburg came and testified to is as simple as  
18 pushing a button to suspend or terminate someone from the  
19 Internet, that is the ability portion of right and ability.

20 So when you have those two facts coming together, and  
21 there is no factual dispute on that, I think that we have  
22 proven right and ability to supervise as a matter of law, and I  
23 think that is something that the jury need not decide. I don't  
24 think any reasonable jury could conclude otherwise.

25 I'm certainly happy to address other issues, but

1 given the time and the fact that it's all been briefed and  
2 argued, I'd just formally renew our motion in full on Rule 50.

3 THE COURT: All right. Thank you, Mr. Allan.

4 I think I said I was going to deny it presently, and,  
5 you know, I'm going to let the jury decide each and every one  
6 of these issues. I'll revisit them down the road if I'm  
7 convinced that I need to, but I think that there's been -- you  
8 know, the jury, you know, they now have had testimony about the  
9 supervision, and, you know, they can decide to believe any and  
10 all or none of any witness's testimony, and so I don't want to  
11 take that -- and they are factual issues, and there has been,  
12 you know, some -- I can't remember what it is, but there has  
13 been some examination on it. So I'm not going to grant summary  
14 judgment on those limited areas.

15 So tomorrow let's take ten minutes each and give me  
16 your best -- I mean, give me what you think you need to give me  
17 to preserve your record. If we've got "not" when there should  
18 be "is" in an instruction, then please let me know, and we'll  
19 try and correct those type of errors, and I'll read the  
20 instructions first, and we'll go from there. All right?

21 Anything else tonight?

22 MR. BRIDGES: I assume we're about to get a copy of  
23 the --

24 THE COURT: Yes. Yeah, if you'll wait for just a --  
25 I've amended this spoliation to add the dates, but we'll be

back in five minutes with that, if you can hang loose. Thank  
you.

MR. BRIDGES: Thank you.

THE COURT: We're in recess.

NOTE: The December 15, 2015 portion of the case is  
concluded.

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CERTIFICATE OF THE REPORTER

We certify that the foregoing is a correct transcript of  
the record of proceedings in the above-entitled matter.

/s/

\_\_\_\_\_  
Anneliese J. Thomson

/s/

\_\_\_\_\_  
Norman B. Linnell